No.

In the Supreme Court of the United States

AT&T MOBILITY LLC AND
AT&T MOBILITY CORPORATION,

Petitioners,

v.

CHARLENE SHORTS AND
PALISADES COLLECTIONS LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Class Action Fairness Act of 2005 (CAFA or Act), Pub. L. No. 109-2, 119 Stat. 4, to ensure that interstate class actions can be litigated in federal court, where Congress believed they belong. Toward that end, the Act expands diversity jurisdiction and liberalizes removal practice. As relevant here, CAFA's removal provision states that a qualifying class action filed in state court "may be removed to a district court of the United States * * * by *any* defendant." 28 U.S.C. § 1453(b) (emphasis added). In this case, a divided panel of the Fourth Circuit held that, when a qualifying (and otherwise-removable) class action is pleaded as a counterclaim rather than an independent suit, the Act prohibits the removal of the class action by a counterclaim defendant—even one that is not an original plaintiff and instead is joined as an "additional" counterclaim defendant.

The question presented is whether CAFA authorizes removal by a counterclaim defendant.

RULE 29.6 STATEMENT

Petitioner AT&T Mobility LLC, a Delaware limited liability company, is an indirect, wholly owned subsidiary of AT&T Inc., a publicly held company. AT&T Mobility LLC is owned by: SBC Long Distance, LLC; SBC Alloy Holdings, Inc.; AT&T Mobility Corporation; New BellSouth Cingular Holdings, Inc.; and BellSouth Mobile Data, Inc. All five of AT&T Mobility LLC's owners are subsidiaries of AT&T Inc., and none is publicly held.

Petitioner AT&T Mobility Corporation, a Delaware corporation, has one owner: BellSouth Mobile Systems, Inc., an indirect, wholly owned subsidiary of AT&T Inc., a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, AT&T Mobility LLC and AT&T Mobility Corporation (together, ATTM), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals and its order denying rehearing en banc (App., *infra*, 1a-37a) are reported at 552 F.3d 327. The memorandum opinion and order of the district court (App., *infra*, 38a-59a) is not published in the *Federal Supplement* but is available at 2008 WL 249083.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2008. The petition for rehearing en banc was denied on January 15, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the Appendix: Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4-5; 28 U.S.C. § 1332; 28 U.S.C. § 1441; 28 U.S.C. § 1446; and 28 U.S.C. § 1453. App., *infra*, 60a-78a.

STATEMENT

This case involves the scope of the removal provision of the Class Action Fairness Act of 2005 (CAFA or Act), Pub. L. No. 109-2, 119 Stat. 4. A divided panel of the Fourth Circuit decided that an interstate class action seeking tens of millions of dollars on behalf of tens of thousands of class members can be removed to federal court under CAFA if it is

pleaded as an independent action, but not, as in this case, if it is pleaded as a counterclaim to an existing action (here, a suit to collect a debt of less than $1,000). The court of appeals' decision is fundamentally mistaken in two separate respects.

For one thing, as Judge Niemeyer demonstrated in his comprehensive panel dissent, the majority's interpretation is "demonstrably at odds" with the "plain language" of CAFA, which authorizes "any defendant" to remove. App, *infra*, 23a, 24a. That "broad language" easily covers a *counterclaim* defendant. *Id.* at 23a. For another, the majority's interpretation undermines CAFA's essential purpose. While Congress adopted the Act to ensure that plaintiffs' lawyers cannot manipulate pleadings to keep a class action in state court, the decision below invites them to do just that, simply by filing the class action as a counterclaim rather than a stand-alone suit.

As Judge Niemeyer observed in his dissent from the denial of rehearing en banc, the question whether a counterclaim defendant may remove a qualifying class action under CAFA "is an important issue of statutory interpretation," and the majority's interpretation "creates an unfortunate loophole in the * * * Act" that plaintiffs' lawyers are exploiting. App., *infra*, 37a. Rather than requesting a poll of the Fourth Circuit on whether to grant rehearing en banc, Judge Niemeyer "prefer[red] to release this case to the early consideration of the Supreme Court." *Id.* at 36a-37a. The Court should accept his invitation to decide this recurring and important question of federal law.

A. Statutory Background

Since the adoption of the Judiciary Act of 1789, § 12, 1 Stat. 79-80, federal statutes have authorized the removal to federal court of certain actions that are filed in state court. The general removal statute currently in force, 28 U.S.C. § 1441(a), provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to [a] district court of the United States." A nearby provision, 28 U.S.C. § 1446, sets forth the procedures for removal. When Congress adopted CAFA in 2005, it added a specific removal provision, 28 U.S.C. § 1453(b), for class actions that are covered by the Act.

Congress enacted CAFA in response to a decade's worth of "abuses of the class action device" by plaintiffs' lawyers. CAFA § 2(a)(2). One of the abuses that prompted Congress to act was the practice of filing interstate class actions in state court. Congress found that state-court judges frequently apply procedural rules "in a manner that contravenes basic fairness" and that class-action lawyers often "effectively control the litigation" in state court, S. REP. NO. 109-14, at 4 (1st Sess. 2005), to the benefit of the lawyers but to the detriment of both "class members with legitimate claims" and "defendants that have acted responsibly," CAFA § 2(a)(2)(A). It was also common for class-action lawyers to "game the system" by manipulating their pleadings to "defeat diversity jurisdiction," thereby ensuring that defendants could not remove class actions to federal court. S. REP. NO. 109-14, at 5.

Congress' main objective in enacting CAFA was to ensure that interstate class actions could be liti-

gated in federal court, so as to prevent the abuses that are prevalent in state court. CAFA § 2(a)(4)(A), (b)(2); S. REP. NO. 109-14, at 4-5. Congress explicitly found that "[a]buses in class actions" undermine "the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution," in that state courts are "keeping cases of national importance out of Federal court," sometimes "acting in ways that demonstrate bias against out-of-State defendants," and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." CAFA § 2(a)(4). Consistent with that finding, the Act specifically states that one of CAFA's purposes is to "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2).

To effectuate that purpose, Congress amended 28 U.S.C. § 1332 in Section 4 of CAFA "to allow federal courts to hear more interstate class actions on a diversity jurisdiction basis," and it added 28 U.S.C. § 1453 in Section 5 of CAFA "to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts." S. REP. NO. 109-14, at 5. As amended by CAFA, and subject to certain exceptions not applicable here, Section 1332 grants original jurisdiction to district courts over class actions in which (a) the amount in controversy exceeds $5 million (aggregating the claims of all putative class members) and (b) minimal diversity exists (*i.e.*, any member of the putative class and any defendant are citizens of different States). 28 U.S.C. § 1332(d)(2), (6). Section 1453, in turn, authorizes the removal of putative class actions filed in state court and eliminates a number of restrictions that

apply to the removal of other types of cases. 28 U.S.C. § 1453(b).

Subsection (b) of Section 1453, the provision at issue here, provides, in full, as follows:

> A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

B. Proceedings In State Court

Respondent Charlene Shorts had a contract for wireless telephone service with ATTM's predecessor in interest. Shorts was permitted to terminate her service at any time and for any reason before the contract term expired, as long as she paid an early termination fee (ETF). When Shorts failed to make timely payments, her account was terminated and she was charged an ETF. ATTM's predecessor in interest subsequently sold Shorts' account debt, which totaled $794.87, to respondent Palisades Collections LLC (Palisades). Palisades attempted to collect the debt but was unable to do so. App., *infra*, 2a-3a, 39a.

Palisades subsequently commenced an action against Shorts to collect the debt in the Magistrate Court of Brooke County, West Virginia. Shorts filed an answer and counterclaim. Palisades then removed the action to the Circuit Court of Brooke County. App., *infra*, 2a-3a, 20a, 39a.

The case lay dormant for more than ten months, until a district court in the Northern District of West

Virginia issued its decision in *CitiFinancial, Inc.* v. *Lightner*, No. 5:06CV145, 2007 WL 1655225 (N.D. W. Va. June 6, 2007). In that case, the plaintiff removed a collection action it had filed in West Virginia state court after the defendant served it with a putative class-action counterclaim. The district court granted the defendant's motion to remand, finding that CitiFinancial, the plaintiff and counterclaim defendant, did not have the right to remove. *Id.* at *2-*3.

Just a few weeks later, putative class counsel in *CitiFinancial* entered an appearance on behalf of Shorts in this case and filed a motion for leave to file an amended counterclaim. The circuit court granted the motion. The amended counterclaim (1) joined ATTM as an "additional counterclaim defendant" and (2) asserted putative class-action claims alleging that the ETFs violated the West Virginia Consumer Credit & Protection Act, W. Va. Code §§ 46A-1-101 *et seq.*, and seeking tens of millions of dollars on behalf of tens of thousands of ATTM subscribers. App., *infra*, 3a-4a, 20a-21a, 39a-40a.[1]

C. Proceedings In The District Court

After being joined as a counterclaim defendant, ATTM removed the action to the United States District Court for the Northern District of West Virginia. Shorts filed a motion to remand the case to state court, citing *CitiFinancial* and arguing that ATTM had no right to remove. The district court granted the motion. App., *infra*, 38a-59a.

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[1] Although Palisades was on the same side of the case as ATTM in the lower courts, it is named as a respondent here pursuant to this Court's Rule 12.6.

As an initial matter, the court found that (1) the aggregated amount in controversy easily exceeds $5 million, (2) there is minimal diversity among the parties, and (3) none of CAFA's exceptions to diversity jurisdiction applies. App., *infra*, 52a-55a. The court therefore agreed with ATTM that "this putative class action meets the jurisdictional requirements of CAFA"; that "federal subject matter jurisdiction exists"; and that the court may "retain jurisdiction if it determines that ATTM has the authority to remove." *Id.* at 42a; see also *id.* at 52a, 54a-55a. The court decided, however, that ATTM does not have the authority to remove. The court reasoned that a counterclaim defendant—even an "additional" counterclaim defendant like ATTM (one that is not a plaintiff and has not chosen to litigate in state court)—"may not remove [a] case to federal court" under the general removal statute, 28 U.S.C. § 1441(a), and that "CAFA does not create independent removal authority." App., *infra*, 47a, 59a. The court therefore ordered that the case be remanded to state court.[2]

D. The Court Of Appeals' Decision

1. Under CAFA, a court of appeals "may accept an appeal from an order of a district court granting

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[2] Shorts' amended counterclaim named only petitioner AT&T Mobility LLC as an "additional" counterclaim defendant. C.A. J.A. 26. But her motion for leave to file the amended counterclaim and the state court's order granting the motion named both petitioner AT&T Mobility LLC and petitioner AT&T Mobility Corporation. *Id.* at 17, 24. In an abundance of caution, therefore, both AT&T Mobility LLC and AT&T Mobility Corporation removed the case to federal court. *Id.* at 33. The two petitioners have remained parties in the federal proceedings ever since. See App., *infra*, 3a n.1.

or denying a motion to remand a class action," 28 U.S.C. § 1453(c)(1), and ATTM filed a petition for permission to appeal the order remanding Shorts' class action. The Fourth Circuit granted the petition. App., *infra*, 5a. On the merits, however, a divided panel of the court of appeals affirmed. *Id.* at 1a-36a.

The majority held that a counterclaim defendant may not remove under CAFA. App., *infra*, 13a-19a. It reasoned that, under this Court's decision in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941), the phrase "may be removed by the defendant" in the general removal provision, 28 U.S.C. § 1441(a), does not cover a counterclaim defendant, and that the phrase "may be removed by *any* defendant" in CAFA's removal provision, 28 U.S.C. § 1453(b) (emphasis added), should be interpreted the same way. App., *infra*, 13a-19a. The majority also rejected ATTM's alternative argument that, even if CAFA incorporates the holding of *Shamrock Oil*, its holding is limited to counterclaim defendants that—unlike ATTM—invoked the jurisdiction of the state court as plaintiffs. *Id.* at 9a-13a.

Judge Niemeyer wrote a lengthy dissent. App., *infra*, 20a-36a. He concluded that "CAFA does indeed authorize [ATTM] to remove this interstate class action, even though [ATTM] was sued as a counterclaim defendant, not as an original defendant," and that the majority's contrary conclusion is "demonstrably at odds" with the statutory text. *Id.* at 22a, 23a. In authorizing removal by "*any* defendant," Judge Niemeyer explained, the "plain language of § 1453(b)" expands removal authority "beyond the limits of § 1441(a)" and abolishes the *Shamrock Oil* rule, which was based on an interpre-

tation of the phrase "the defendant" in the predecessor to Section 1441(a). *Id.* at 23a-26a. Judge Niemeyer also concluded that *Shamrock Oil*'s holding is in any event limited to counterclaim defendants that were plaintiffs. *Id.* at 27a n.3.

2. ATTM filed a petition for rehearing en banc. The Fourth Circuit denied the petition, but Judge Niemeyer again dissented. App., *infra*, 36a-37a. In its entirety, his dissenting opinion read as follows:

> While I find the petition for rehearing persuasive, I do not request a poll of the court. Because there is a respectable division of opinion on the issue of whether a party joined as an additional defendant to a counterclaim has rights under the Class Action Fairness Act, I prefer to release this case to the early consideration of the Supreme Court. This is an important issue of statutory interpretation, and the majority's interpretation creates an unfortunate loophole in the Class Action Fairness Act that only the Supreme Court can now rectify.

Ibid.[3]

REASONS FOR GRANTING THE PETITION

The court of appeals majority held that, when a qualifying (and otherwise-removable) class action is pleaded as a counterclaim rather than an independent suit, CAFA prohibits removal by a counterclaim defendant—even an "additional" one like ATTM. The court of appeals' decision is fundamentally inconsistent both with the unambiguous text of the Act

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[3] The proceedings in state court have been held in abeyance while ATTM pursues its appellate remedies in federal court.

and with its undisputed purpose. The question presented—whether plaintiffs' lawyers may circumvent an important federal statute through a pleading device—is a recurring one of great consequence. And this case is an ideal vehicle for deciding it.

Although this is the first case in which a court of appeals has squarely addressed whether CAFA authorizes a counterclaim defendant to remove a qualifying class action, that is not a reason to deny review. This Court will ultimately have to decide the question if it agrees that the Fourth Circuit's decision is seriously flawed: either the error will be replicated in other circuits or a conflict will develop. The issues have been fully ventilated by the panel majority and dissent here. Awaiting another case would merely encourage expensive, wasteful, and—if our position is correct—unjustified litigation. Those harms would be compounded by the inevitability of coerced settlements following class certification in state court, which is precisely what CAFA was intended to prevent. There is no need to wait for a circuit conflict when an erroneous statutory decision threatens nationwide harm. See E. Gressman et al., SUPREME COURT PRACTICE § 4.13 (9th ed. 2007). The Court should accept Judge Niemeyer's invitation to grant review now.

A. The Court Of Appeals' Decision Is Manifestly Erroneous

The Fourth Circuit majority's interpretation of CAFA is clearly wrong for two independent reasons. First, in authorizing removal by "any" defendant, the Act unambiguously authorizes removal by a *counterclaim* defendant. Second, even if the statutory text were somehow deemed ambiguous, the ambiguity would have to be resolved in favor of a counterclaim

defendant's right to remove, because the contrary interpretation would undermine the congressional objectives to authorize qualifying class actions to be litigated in federal court and to prevent plaintiffs' lawyers from defeating removal through manipulation of pleadings.

1. The court of appeals' decision is inconsistent with CAFA's clear text

As Judge Niemeyer explained in his panel dissent, the "plain language" of CAFA "unambiguously grants [ATTM] removal authority" and "clearly provides" that "this interstate class action [may] proceed in federal court." App., *infra*, 31a, 36a.

a. CAFA's removal provision, 28 U.S.C. § 1453(b), states that a class action "may be removed by any defendant." As this Court recently observed, a statutory phrase introduced by the word "any" is ordinarily interpreted to have "a broad meaning." *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831, 835 (2008); accord *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980). "[R]ead naturally," the word "any" means "one or some indiscriminately of whatever kind." *Ali*, 128 S. Ct. at 835-836 (internal quotation marks omitted). And a counterclaim defendant "is certainly a 'kind' of defendant and falls easily within 'indiscriminately of whatever kind' of defendant." App., *infra*, 24a (Niemeyer, J., dissenting). The court of appeals majority offered no persuasive responses to this straightforward reading of the statute; each of them was decisively refuted by Judge Niemeyer's panel dissent.

For example, the majority believed that the phrase "may be removed by any defendant" in

CAFA's removal provision has the same meaning as the phrase "may be removed by *the* defendant" in the general removal provision, 28 U.S.C. § 1441(a) (emphasis added), which has been interpreted to exclude a counterclaim defendant. App., *infra*, 16a-17a. As Judge Niemeyer explained, however, "[t]he article 'the' *restricts* the noun that follows, while the article 'any' *expands* its meaning." *Id.* at 27a (emphasis added).

The Fourth Circuit majority also thought that CAFA incorporates this Court's holding in *Shamrock Oil* that a counterclaim defendant could not remove under the general removal provision then in effect. App., *infra*, 9a-10a, 14a, 16a. But as Judge Niemeyer explained, *Shamrock Oil*'s holding was based on the interpretation of the phrase "*the* defendant" in the statute at issue there. *Id.* at 27a (emphasis added). Because CAFA uses expansive language, Congress could not have meant to incorporate a judicial interpretation of restrictive language.

The majority also took the position that, because the phrase "may be removed by any defendant" immediately precedes the phrase "without the consent of all defendants," the sole purpose of the "any defendant" language in Section 1453(b) was to abrogate the requirement that defendants unanimously consent to removal. App., *infra*, 17a. As Judge Niemeyer explained, however, the unanimous-consent rule, which was adopted in *Chicago, Rock Island & Pacific Railway* v. *Martin*, 178 U.S. 245 (1900), was based on the same language as the *Shamrock Oil* rule—"the defendant or defendants"—and the different language in Section 1453(b) could not have been

meant to "abolish[] the *Martin* rule while leaving untouched the *Shamrock Oil* rule." App., *infra*, 25a.[4]

Finally, in interpreting CAFA narrowly, the court of appeals majority relied on the federalism-based interpretive canon that removal statutes are strictly construed. App., *infra*, 13a , 17a-18a. But as Judge Niemeyer explained, an interpretive canon "cannot defeat the plain meaning of the statutory language," and, in any event, "the justifications for th[is] canon are not present [here] in view of Congress' explicit purposes for enacting CAFA." *Id.* at 29a. As to the latter, CAFA "unquestionably expand[s] federal jurisdiction and liberalize[s] removal authority," and it makes clear—in Section 2(b)(2)—that that expansion and liberalization is intended "to *further* the proper balance of federalism." *Id.* at 30a; see also S. REP. NO. 109-14, at 23 ("*National Class Actions Belong in Federal Court Under Traditional Notions of Federalism*").

b. There is another clear indication in the statutory text—apart from the phrase "any defendant"—that CAFA authorizes a counterclaim defendant to remove. Section 1453(b) begins with the broad statement that "[a] class action may be removed to a district court of the United States," without specifying which parties are authorized to remove. It thus differs from Section 1441(a), which specifies that "any civil action * * * may be removed *by the defendant or the defendants*[] to [a] district court of the United States" (emphasis added). This Court has

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[4] Even if CAFA does incorporate the *Shamrock Oil* rule, the rule is limited to counterclaim defendants that—unlike ATTM—invoked the jurisdiction of the state court as plaintiffs. See *infra* pp. 25-26.

held that, because a statute providing generally that "rights * * * may be enforced by civil actions in appropriate United States district courts" contains "no particular statutory restrictions on potential plaintiffs," the statute does not contemplate a "restricted class of plaintiffs." *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 102-103 (1979). So too here. Because the opening phrase of Section 1453(b) contains no particular statutory restrictions on who may remove, the provision does not contemplate a restricted class of defendants with removal authority.

The court of appeals majority rejected this argument because Section 1453(b) states that a class action may be removed "in accordance with section 1446," and Section 1446(a) in turn provides that "[a] defendant or defendants" must file a notice of removal. App., *infra*, 14a. On the basis of that language, the majority concluded that Congress "did not intend to extend the right of removal [in Section 1453(b)] to parties other than 'defendant[s].'" *Ibid.* As Judge Niemeyer explained in his panel dissent, however, Section 1446 "neither creates nor alters removal authority, being entirely procedural, as suggested by its title, 'Procedure for Removal.'" *Id.* at 25a n.1. That removal under Section 1453(b) must be "in accordance with" Section 1446 simply means that removal of class actions is governed by the *procedures* set forth in Section 1446 (except insofar as Section 1453(b) provides otherwise).

2. The court of appeals' decision undermines CAFA's essential purpose

There is a separate reason why the court of appeals' interpretation of CAFA is wrong: it undermines Congress' objective to ensure that class actions like this one can be litigated in federal court. A stat-

ute should not be interpreted in a way that defeats its purpose unless there is clear statutory language that leaves a court with no choice; and there is no such language in CAFA. Even if the statutory text does not unambiguously *authorize* removal by counterclaim defendants—and, as we explain above, it does—the text certainly does not unambiguously *prohibit* removal by counterclaim defendants. For that reason, "the interpretation that is consistent with [the Act's] goal is permissible as well as preferable." *Springman* v. *AIG Mktg., Inc.*, 523 F.3d 685, 688 (7th Cir. 2008) (Posner, J.). That is particularly true when, as here, the goal is "part of the statutory text." App., *infra*, 30a (Niemeyer, J., dissenting).

a. Every piece of evidence in the legislative record demonstrates that Congress enacted CAFA to ensure that plaintiffs' lawyers cannot manipulate pleadings to defeat removal of qualifying class actions and that all such class actions can be litigated in federal court at the defendant's option.

To begin with the text, Section 2 of the Act sets forth the "finding[]" of Congress that "there have been abuses of the class action device" that have "undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction," in that class-action counsel have been "keeping cases of national importance out of Federal court." CAFA § 2(a)(2), (4)(A). Consistent with that finding, one of the legislative "purposes" set forth in the Act is to "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2).

The Senate Judiciary Committee's Report includes more detailed findings and purposes. The Report observes that prior law enabled lawyers to

"'game' the procedural rules" by "manipulat[ing] their pleadings" to keep class actions in state court—for example, by adding parties to defeat complete diversity or alleging that no individual class member was seeking damages above the jurisdictional threshold. S. REP. NO. 109-14, at 4, 26. The Report explains that CAFA addresses this problem by amending the law to ensure that interstate class actions can be litigated in "the proper forum—the federal courts," where the Committee "firmly believes" such actions belong. *Id.* at 5.

While CAFA was being debated, virtually every sponsor of the legislation—in both Houses, and of both parties—expressed the same view.[5] The President made a similar point when he signed the Act into law.[6] And courts interpreting the Act have likewise recognized that CAFA's purpose is to prevent plaintiffs' lawyers from gaming the system to keep interstate class actions in state court.[7]

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[5] See, *e.g.*, 151 CONG. REC. S1086-02, 1099 (daily ed. Feb. 8, 2005) (statement of Sen. Kohl) ("Our bill attempts to * * * ensure that cases with a national scope are heard in Federal court."); *id.* at 1105 (statement of Sen. Grassley) ("[CAFA] will allow nationwide class actions to be heard in a proper forum, the Federal courts."); 151 CONG. REC. H723-01, 726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("The bill before the House today offers commonsense procedural changes that will end the most serious abuses by allowing more interstate class actions to be heard in Federal courts.").

[6] See Remarks on Signing the Class Action Fairness Act of 2005, 41 WEEKLY COMP. PRES. DOC. 265, 266 (Feb. 18, 2005) ("[CAFA] moves most large, interstate class actions into Federal courts. This will prevent trial lawyers from shopping around for friendly local venues.").

[7] See, *e.g.*, *Johnson* v. *Advance Am., Cash Advance Ctrs. of S.C., Inc.*, 549 F.3d 932, 935 (4th Cir. 2008); *Estate of Pew* v.

b. What Congress enacted CAFA to prevent is precisely what the court of appeals' decision permits.

The district court found—and neither Shorts nor the Fourth Circuit majority disputed—that the putative class action here satisfies CAFA's jurisdictional requirements (*i.e.*, minimal diversity and an amount in controversy of more than $5 million). App., *infra*, 42a, 52a, 54a-55a; see also *id.* at 32a (Niemeyer, J., dissenting). It would therefore have been removable if it had been filed as a freestanding suit. The majority held that ATTM may not remove the class action "because, *and only because*, [ATTM] was sued as an additional defendant in a counterclaim, as distinct from being named an original defendant in an independent action." *Id.* at 22a (Niemeyer, J., dissenting).

The consequence of the court of appeals' decision is that a putative class action that seeks tens of millions of dollars on behalf of tens of thousands of class members may be removed if it is pleaded as an independent action but not, as in this case, if it is pleaded as a "counterclaim" to an action brought by a single debt collector to recover a few hundred dollars from a single customer. Congress could not have intended to enable plaintiffs' lawyers to circumvent CAFA through the simple expedient of recruiting a defendant in a state-court action to serve as a "counterclaim plaintiff" in an otherwise-removable class action. And courts should not "interpret[] th[e] Act as containing a loophole that Congress could not have intended to create." *Morse* v. *Republican Party of*

Cardarelli, 527 F.3d 25, 26 (2d Cir. 2008); *Lowery* v. *Ala. Power Co.*, 483 F.3d 1184, 1197 (11th Cir. 2007); *Pritchett* v. *Office Depot, Inc.*, 420 F.3d 1090, 1097 (10th Cir. 2005).

Va., 517 U.S. 186, 239 (1996) (Breyer, J., concurring in the judgment).

Indeed, "loophole" is probably not an adequate term. The rule adopted by the district court is tantamount to a determination that CAFA's removal provisions have no application to the very substantial proportion of class actions—including the type at issue here—that can be pleaded as counterclaims. See, *e.g.*, Emery G. Lee III & Thomas E. Willging, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS 4 (2008) (finding that so-called "consumer protection/fraud class actions" constituted more than one fifth of all class actions filed in or removed to federal court in the first half of 2007). It is inconceivable that Congress intended to leave such a large category of class actions in state court. On the contrary, that result is so "anomalous" that—to put it mildly—it "[can]not easily [be] attributable to congressional intent." *Cedar Rapids Cmty. School Dist.* v. *Garret F.*, 526 U.S. 66, 78 n.10 (1999).

c. Remarkably, neither Shorts nor the court of appeals majority took issue with any of this. Neither denied that Congress enacted CAFA to ensure that plaintiffs' lawyers cannot manipulate pleadings to defeat removal of qualifying class actions and that all such class actions can be litigated in federal court. And neither denied that their interpretation of CAFA ensures that plaintiffs' lawyers *can* manipulate pleadings to defeat removal of qualifying class actions and that many such class actions can*not* be litigated in federal court.

Nor did Shorts or the Fourth Circuit majority suggest any countervailing consideration that might have led Congress to enact a law that allows such easy circumvention of its core purpose. Indeed, nei-

ther made any attempt to explain why the rule the court adopted even *makes sense*—why a putative class action seeking to recover tens of millions of dollars on behalf of tens of thousands of class members should be removable if it is filed as a freestanding action but not if it is appended as a "counterclaim" to a suit to collect a small debt.

An academic defender of the class-action-as-counterclaim tactic—and, not coincidentally, a consultant to Shorts—has asserted that, after CAFA, the choice between filing a qualifying class action as an independent suit and filing it as a counterclaim depends upon whether class counsel "wishes to litigate in federal or state court." Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193, 197 (2007); *see id.* at 193 n.*. But the whole point of CAFA is that it is the class-action *defendant* that gets to decide whether to litigate a qualifying case in federal or state court.

As for the Fourth Circuit majority, while tacitly acknowledging that its decision will leave a large number of class actions in state court, it suggested that that result is not inconsistent with Congress' intent, because "§ 1332(d) itself leaves many class actions in state courts." App., *infra*, 18a. But those cases, by definition, are not *qualifying* class actions under CAFA, and Congress had good reason to leave them in state court—namely, its determination that they are not "interstate cases of national importance." CAFA § 2(b)(2). By contrast, there is no reason—and neither Shorts nor the court of appeals majority suggested any—why Congress would have intended to leave *qualifying* class actions in state court

whenever counsel chooses to plead them as counterclaims rather than independent suits.

d. As Judge Niemeyer observed in his panel dissent, this Court "recently relied upon * * * statutory * * * purposes in rejecting an artificial reading" of another statute enacted to stem abusive class actions. App., *infra*, 30a. That case—*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71 (2006)—involved the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (1998), which prohibits the filing of certain securities-fraud class actions premised on state law. Plaintiffs' lawyers had begun to employ that tactic after Congress placed limits on securities-fraud class actions premised on *federal law* in the Private Securities Litigation Reform Act of 1995 (1995 Reform Act), Pub. L. No. 104-67, 109 Stat. 737 (1995).

In *Dabit*, the court of appeals interpreted SLUSA narrowly, finding that a category of state-law class actions was not covered by the statute and thus was not preempted. This Court unanimously reversed. It explained that "[t]he presumption that Congress envisioned a broad construction" follows, in part, from "the particular concerns that culminated in SLUSA's enactment." *Dabit*, 547 U.S. at 86. The Court believed that "[a] narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits * * * from being used to frustrate the objectives' of the 1995 Act." *Id.* (quoting SLUSA § 2(5)).

So too here. The presumption that Congress envisioned a broad construction of CAFA follows, in

part, from the particular concerns that culminated in its enactment. A narrow reading of CAFA would allow plaintiffs' lawyers to litigate interstate class actions in state court and thus run contrary to one of its stated purposes, *viz.*, to "provid[e] for Federal court consideration of interstate cases of national importance." CAFA § 2(b)(2).[8]

B. The Question Presented Is A Recurring One Of Great Importance

Apart from being manifestly erroneous, the court of appeals' decision warrants review because the question in the case—whether plaintiffs' lawyers may defeat removal by pleading class actions as counterclaims—is a recurring one of great importance. That is why Judge Niemeyer urged this Court to decide the question. As he put it in his opinion dissenting from the denial of rehearing en banc, whether CAFA authorizes a counterclaim defendant to remove "is an important issue of statutory inter-

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[8] At the merits stage in the court of appeals, Shorts claimed for the first time that, regardless of whether CAFA grants ATTM the *authority* to remove a counterclaim class action, it does not grant a district court *jurisdiction* over a counterclaim class action (even though a district court would have had jurisdiction over Shorts' class action if it had been filed as an independent suit). Shorts argued that the term "civil action" in 28 U.S.C. § 1332(d)(2), which grants district courts jurisdiction over class actions in which the amount in controversy exceeds $5 million and there is minimal diversity, does not encompass a counterclaim. See App., *infra*, 32a. The court of appeals majority did not address that argument, see *id.* at 13a n.3, but Judge Niemeyer did, and he correctly rejected it, see *id.* at 31a-35a. A "civil action" is simply a "civil * * * judicial proceeding," BLACK'S LAW DICTIONARY 31 (8th ed. 2004), and a counterclaim is no less a part of a "judicial proceeding" than the claims raised in the complaint.

pretation," and the majority's holding that it does not "creates an unfortunate loophole in the * * * Act." App., *infra*, 37a. Rather than requesting a poll of the Fourth Circuit's judges on whether to rehear the case en banc, Judge Niemeyer "prefer[red] to release this case to the early consideration of the Supreme Court." *Id.* at 36a-37a.

The question presented is important for the same reason (or one of the reasons) that the decision below is clearly wrong: the court of appeals' interpretation undermines CAFA's basic purpose. See *supra* Point A.2. By allowing plaintiffs' lawyers to manipulate their pleadings to keep class actions in state court, the Fourth Circuit's decision has ratified the very tactic that CAFA was enacted to prevent.

The question presented is also a recurring one. As the practices that led to CAFA's enactment amply demonstrate, plaintiffs' lawyers in general, and class-action counsel in particular, have proven themselves adept at exploiting loopholes—including the loophole that is the subject of this petition. Class counsel can be expected to take advantage of every opportunity to keep a case in state court, so as to obtain the benefits of litigating there (including a higher likelihood of class certification) and thus increase—perhaps dramatically—the settlement value of the suit.[9]

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[9] For example, in a putative class action that AT&T Wireless, a predecessor of ATTM, did successfully remove, the district court compelled arbitration of the plaintiff's claims notwithstanding his contention that the arbitration provision was unconscionable under West Virginia law. *Schultz* v. *AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 689-691 (N.D. W. Va. 2005). By contrast, a West Virginia state court subsequently declared AT&T Wireless's arbitration provision unconscionable and refused to

That is what putative class counsel did here; and it is what counsel have done in many other cases since CAFA's enactment.[10] Indeed, as Shorts' consultant has correctly observed, the cases in which the class-action-as-counterclaim tactic has already been employed are likely "just the tip of an approaching iceberg." Tidmarsh, *supra*, at 199. And both the size and the speed of that iceberg are sure to increase as a consequence of the tactic's ratification by the court of appeals majority, which has provided a guide to counsel on how to circumvent the Act.

CAFA has been described as "the most significant legislative reform of complex litigation in American history," Lonny Sheikopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 410 (2008), and, more generally, as "arguably the most important tort reform in recent years," Anthony J.

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enforce it. *Paetzold* v. *Palisades Collections, LLC*, No. 07-C-272 (Ohio Cty., W. Va. Cir. Ct. Dec. 26, 2007). About a year later, ATTM successfully removed a putative class action, and the district court enforced ATTM's arbitration provision, rejecting the plaintiffs' unconscionability arguments. *Strawn* v. *AT&T Mobility, Inc.*, 593 F. Supp. 2d 894 (S.D. W. Va. 2009). The marked difference between state and federal courts in the enforcement of arbitration provisions is just one of many ways in which the forum matters greatly.

[10] *See, e.g.*, *Progressive W. Ins. Co.* v. *Preciado*, 479 F.3d 1014 (9th Cir. 2007) (insurance); *Unifund CCR Partners* v. *Wallis*, No. Civ. A 06-CV-545-GRA, 2006 WL 908755 (D.S.C. Apr. 7, 2006) (credit card); *CitiFinancial, Inc.* v. *Lightner*, No. 5:06CV145, 2007 WL 1655225 (N.D. W. Va. June 6, 2007) (consumer loan); *Ford Motor Credit Co.* v. *Jones*, No. 1:07CV728, 2007 WL 2236618 (N.D. Ohio July 31, 2007) (automobile lease). Like the Fourth Circuit majority here, the court in each of these cases reached the erroneous conclusion—albeit with little or no analysis of the statutory text or purpose—that a counterclaim defendant may not remove a class action under CAFA.

Sebok, *What Do We Talk About When We Talk About Mass Torts?*, 106 MICH. L. REV. 1213, 1216 n.14 (2008). A court of appeals' decision that severely undermines the purpose of such a statute should not be permitted to stand without consideration by this Court—particularly when neither the court of appeals nor the party for which it ruled denied that the decision has that effect. That is all the more true when the court of appeals' decision is issued over a powerful dissent. Because of the "clear misreading by the lower courts of * * * [an] important federal statute," *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 5 (1991), the Court should accept Judge Niemeyer's invitation to grant review.

C. This Case Is An Ideal Vehicle For Deciding The Question Presented

For at least three reasons, this case is an ideal vehicle for deciding whether CAFA authorizes a counterclaim defendant to remove a qualifying class action.

First, as far as ATTM's ability to have Shorts' class action litigated in federal court is concerned, the rule adopted by the court of appeals is outcome-determinative. As Judge Niemeyer pointed out in his panel dissent, "[t]he district court concluded and Shorts acknowledges that the class action counterclaim in this case meets the [jurisdictional] requirements of [CAFA] insofar as it alleges the jurisdictional amount ($5 million) and diversity of citizenship (minimal diversity)." App., *infra*, 32a. As Judge Niemeyer also pointed out, the panel majority held that ATTM may not remove the class action "because, *and only because*, [ATTM] was sued as an additional defendant in a counterclaim, as distinct from being named an original defendant in an independ-

ent action." *Id.* at 22a. If this Court were to hold that CAFA grants counterclaim defendants the same removal authority as original defendants, therefore, this case would proceed in federal court.

Second, because ATTM is an "additional" counterclaim defendant, the rule adopted by the court of appeals is the broadest possible one, excluding from the reach of CAFA's removal provision both counterclaim defendants that were plaintiffs in state court and those that were not. Contrary to the Fourth Circuit majority's assertion, therefore, its holding is hardly a "narrow" one. App., *infra*, 20a.

Indeed, even if the majority were correct in its belief that CAFA incorporates the holding of *Shamrock Oil* (despite the differences in statutory language), its conclusion that an "additional" counterclaim defendant may not remove a qualifying class action would still be wrong. As Judge Niemeyer pointed out in his panel dissent, *Shamrock Oil* "denied a [counterclaim] defendant *who was also a plaintiff* the authority to remove," App., *infra*, 28a n.3 (emphasis added), and the holding of *Shamrock Oil* depended on the counterclaim defendant's status as a plaintiff. The rationale for the decision was that it would be unfair to allow the party that had chosen to litigate in state court to remove the case to federal court.[11] A number of lower courts have recognized as

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[11] *Shamrock Oil* framed the "question for decision" as "whether the suit in which the counterclaim is filed, is one removable *by the plaintiff* to the federal district court." 313 U.S. at 103 (emphasis added). The stated justification for the Court's holding that the suit was not removable was that "the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal." *Id.* at 106. Quoting the legislative history, the Court emphasized that the

much, and—unlike the court of appeals majority here—have therefore declined to extend *Shamrock Oil*'s holding to "additional" counterclaim defendants.[12]

Third, both sides of the important issue of statutory interpretation in this case have been comprehensively explored in the majority and dissenting opinions of the court of appeals. Their exhaustive treatment of the issue both makes this case an ideal vehicle for deciding the question presented and obviates the need to await further developments in the lower courts. That is why, rather than requesting an en banc poll of the Fourth Circuit, Judge Niemeyer "release[d] this case to the early consideration of the Supreme Court." App., *infra*, 36a-37a.

CONCLUSION

The petition for a writ of certiorari should be granted.

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reason the statute restricted the right to remove to "the defendant" was that Congress believed it to be "just and proper to require the plaintiff to abide his selection of a forum" and that, if the plaintiff "elects to sue in a State court when he might have brought his suit in a Federal court," there was "no good reason to allow him to remove the cause." *Id.* at 106 n.2 (quoting H.R. REP. NO. 49-1078, at 1 (1st Sess. 1887)). The Court also relied, *id.* at 105-06, 108, on its prior decision in *West* v. *Aurora City*, 73 U.S. 139 (1868), which held that "[t]he right of removal is given only to a defendant who has not submitted himself to [the State court's] jurisdiction; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action." *Id.* at 141.

[12] See *State of Tex.* v. *Walker*, 142 F.3d 813, 816 (5th Cir. 1998); *Mace Sec. Int'l, Inc.* v. *Odierna*, No. 08-60778-CV, 2008 WL 3851839 at *4 (S.D. Fla. Aug. 14, 2008); *H & R Block, Ltd.* v. *Housden*, 24 F. Supp. 2d 703, 706 (E.D. Tex. 1998).

Respectfully submitted.

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MARCH 2009

APPENDICES

APPENDIX A

United States Court of Appeals,
Fourth Circuit.

PALISADES COLLECTIONS LLC, Plaintiff,
v.
Charlene SHORTS, Defendant-Appellee,
v.
AT&T Mobility LLC; AT&T Mobility Corporation,
Counter-Defendants-Appellants.

Chamber of Commerce of the United States, Amicus Supporting Appellants.

No. 08-2188.

Argued: Oct. 30, 2008.
Decided: Dec. 16, 2008.

Order Denying Rehearing En Banc Jan. 15, 2009.

ARGUED: Dan Himmelfarb, Mayer Brown, L.L.P., Washington, D.C., for Appellants. Christopher James Regan, Bordas & Bordas, Wheeling, West Virginia, for Appellee. ON BRIEF: William M. Connolly, Michael P. Daly, Drinker Biddle & Reath, L.L.P., Philadelphia, Pennsylvania; Jeffrey M. Wakefield, Christina S. Terek, Flaherty Sensabaugh & Bonasso, P.L.L.C., Charleston, West Virginia; Evan M. Tager, Charles A. Rothfeld, Jack Wilson, Mayer Brown, L.L.P., Washington, D.C., for Appellants. Jonathan Bridges, Susman Godfrey, L.L.P., Dallas, Texas; William R.H. Merrill, Susman Godfrey, L.L.P., Houston, Texas, for Appellee. Robin S. Conrad, Amar D. Sarwal, National Chamber Litigation Center, Inc., Washington, D.C.; John H. Beisner, Jessica Davidson Miller, Charles E. Borden, Richard G. Rose, O'Melveny & Myers, L.L.P., Washington,

D.C., for Amicus Supporting Appellants. William David Wilmoth, Karen Elizabeth Kahle, Steptoe & Johnson, P.L.L.C., Wheeling, West Virginia; Joseph Anthony Curia, III, Steptoe & Johnson, P.L.L.C., Charleston, West Virginia, for Palisades Collections, LLC, on the merits.

Before WILLIAMS, Chief Judge, and NIEMEYER and KING, Circuit Judges.

Affirmed by published opinion. Chief Judge WILLIAMS wrote the opinion, in which Judge KING concurred. Judge NIEMEYER wrote a dissenting opinion.

WILLIAMS, Chief Judge:

This case presents an issue of first impression-whether a party joined as a defendant to a counterclaim (the "additional counter-defendant") may remove the case to federal court solely because the counterclaim satisfies the jurisdictional requirements of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the United States Code). We hold that neither 28 U.S.C.A. § 1441(a) (West 2006) nor 28 U.S.C.A § 1453(b) (West 2006 & Supp.2008) permits removal by such a party.

I.

On June 23, 2006, Palisades Collection L.L.C. ("Palisades"), a Delaware corporation, initiated a collection action in West Virginia state court against Charlene Shorts, a West Virginia resident, to recover $794.87 in unpaid charges plus interest on Shorts's cellular phone service contract.

The contract, originally entered into with AT&T Wireless Services, Inc., provided that Shorts would

be charged a $150.00 early termination fee if she defaulted on her payment obligations before the end of the contract. In October 2004, Cingular Wireless L.L.C. ("Cingular") merged with AT&T Wireless Services, Inc. to become AT&T Mobility L.L.C. ("ATTM"). Before her contract term expired, ATTM determined that Shorts was in default on her account, terminated her service, and charged her the early termination fee. In June 2005, ATTM assigned its right to collect on Shorts's default to Palisades.

After Palisades filed the collection action in state court, Shorts filed an answer denying the complaint's allegations. Shorts also asserted a counterclaim against Palisades, alleging "unlawful, unfair, deceptive and fraudulent business act[s] and practices," in violation of the West Virginia Consumer Credit & Protection Act (the "Act"), as codified at W. Va. Code Ann. § 46A-6-104 (LexisNexis 2006). (J.A. at 8). Almost one year later, the state court granted Shorts leave to file a first amended counterclaim joining ATTM as an additional counter-defendant.[1] The

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[1] We note that "[a] counterclaim is any suit by a defendant against the plaintiff including any claims properly joined with the claims against the plaintiff. A counter-defendant need not also be a plaintiff." *Dartmouth Plan, Inc. v. Delgado*, 736 F. Supp. 1489, 1491 (N.D. Ill. 1990); *Starr v. Prairie Harbor Dev. Co.*, 900 F. Supp. 230, 233 (E.D. Wis. 1995) (agreeing with Delgado's conclusion that additional parties joined as defendants on a counterclaim are "properly characterized as 'counterclaim defendants' for removal purposes"). *See also Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705, 92 S. Ct. 1344, 31 L. Ed. 2d 612 (1972) (referring to a party as "the additional counter-defendant").

Also, the district court properly noted that there is "some confusion as to the identity of the counterclaim defendants." *Palisades Collections L.L.C. v. Shorts*, No. 5:07CV098, 2008 U.S.

amended counterclaim alleged that Palisades and ATTM violated the Act by "systematically contract[ing] for, charg[ing], attempt[ing] to collect, and collect[ing] illegal default charges in excess of the amounts allowed by West Virginia Code § 46A-2-115(a) and impos[ing] unconscionable charges in violation of § 46A-2-121." (J.A. at 26.)

Shorts filed a motion for class certification, seeking to represent a class of individuals under similar contracts with Cingular and ATTM, but before the state court could rule on that motion, ATTM removed the case to the United States District Court for the Northern District of West Virginia. In response, Shorts filed a motion to remand, arguing that ATTM could not remove the case because it was not a "defendant" pursuant to the general removal statute, 28 U.S.C.A. § 1441. The district court granted Shorts's motion and remanded the case to state court, concluding that ATTM could not remove the case to federal court because: (1) "it [was] not a 'defendant' for purposes of removal under § 1441," *Palisades Collections L.L.C. v. Shorts*, No. 5:07CV098, 2008 WL

Dist. LEXIS 6354, at *3 n.2, 2008 WL 249083, at *1 n.2 (N.D. W.Va. Jan. 29, 2008). Although Shorts requested leave to amend her counterclaim to assert causes of action against Palisades Collections L.L.C., AT&T Mobility L.L.C., and AT&T Mobility Corporation and served both AT&T Mobility L.L.C. and AT&T Mobility Corporation with the amended counterclaim, she named only Palisades and AT&T Mobility L.L.C. in the actual counterclaim. Nevertheless, both AT&T Mobility L.L.C. and AT&T Mobility Corporation joined in the notice of removal and in the memorandum in opposition to Shorts's motion to remand. The district court treated AT&T Mobility Corporation as a counter-defendant and referred to both AT&T Mobility entities jointly as "ATTM." We will do the same.

249083, at *5, 2008 U.S. Dist. LEXIS 6354, at *13 (N.D. W.Va. Jan. 29, 2008), and (2) CAFA does not create independent removal authority that would allow ATTM to "circumvent the long-standing requirement that only a true defendant may remove a case to federal court," *id.* 2008 WL 249083, at *10, 2008 U.S. Dist. LEXIS 6354, at *29.

We granted ATTM permission to appeal, and we possess jurisdiction to review the district court's remand order under 28 U.S.C.A. § 1453(c)(1).

II.

ATTM makes two principal arguments. First, in its notice of removal, ATTM contended that the case is removable under the general removal statute, 28 U.S.C.A. § 1441.[2] Second, on appeal, ATTM now argues that, even if § 1441 does not permit removal by additional counter-defendants, § 1453(b), added by CAFA, constitutes a separate removal power authorizing ATTM to remove. ATTM also makes an additional argument that, if neither § 1441 nor § 1453(b) permits removal by additional counter-defendants,

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[2] In the *jurisdictional* statement portion of its notice of removal, ATTM demonstrated that the counter-claim satisfied the requirements of CAFA and then stated that "[b]ecause this action states a basis for original subject matter jurisdiction under 28 U.S.C. § 1332, *this action is removable pursuant to 28 U.S.C. § 1441(a).*" (J.A. at 37 (emphasis added).) In the *procedural* statement portion of its notice of removal, ATTM stated that, pursuant to 28 U.S.C.A. § 1453 (West 2006 & Supp. 2008), it could remove the case without obtaining the consent of all defendants and regardless of whether one of the defendants was a citizen of West Virginia, the state in which the action was brought; ATTM also relied on 28 U.S.C.A. § 1441(a) (West 2006) to establish that venue was proper in the Northern District of West Virginia.

then we should realign the parties to make ATTM a traditional defendant.

ATTM's first two arguments raise questions concerning removal to federal court and issues of statutory interpretation, which we review *de novo*. *Payne ex rel. Estate of Calzada v. Brake*, 439 F.3d 198, 203 (4th Cir. 2006) (questions concerning removal); *United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003) (issues of statutory interpretation). In resolving this case, we are mindful that "federal courts, unlike most state courts, are courts of limited jurisdiction, created by Congress with specified jurisdictional requirements and limitations." *Strawn v. AT&T Mobility L.L.C.*, 530 F.3d 293, 296 (4th Cir. 2008). And, we are likewise cognizant that "[w]e must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 558, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (citation omitted).

"When interpreting statutes, we start with the plain language." *United Seniors Ass'n, Inc. v. Social Sec. Admin.*, 423 F.3d 397, 402 (4th Cir.2005) (internal quotation marks omitted). We also recognize that "[s]tatutory construction is a holistic endeavor," *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004), and that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). *See also United States*

v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122, 12 L. Ed. 1009 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988) (citations omitted).

A.

Before turning to the issues raised in this appeal, an overview of the relevant jurisdictional statutes is appropriate to place the following discussion in context.

The general removal statute, 28 U.S.C.A. § 1441, provides that "any civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the *defendant or the defendants*, to the district court of the United States for the district and division embracing the place where such action is pending." § 1441(a) (emphasis added). Section 1446 of Title 28 of the United States Code establishes the procedures for removal of a case under § 1441. *See* 28 U.S.C.A. § 1446 (West 2006).

Through CAFA, Congress expanded federal diversity jurisdiction by amending 28 U.S.C.A. § 1332 to give federal district courts *original jurisdiction* of "any civil action in which the matter in controversy

exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which-(A) any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C.A. § 1332(d)(2) (West 2006).

In addition to amending § 1332, Congress also added 28 U.S.C.A. § 1453(b), which provides:

> A class action may be removed to a district court of the United States in accordance with [28 U.S.C. §] 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

For purposes of § 1453(b), Congress defined a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C.A. § 1332(d)(1)(B); *see* 28 U.S.C.A. § 1453(a) (explaining that, for purposes of § 1453, a class action has the meaning given in § 1332(d)(1)).

Section 1453(b) eliminates at least three of the traditional limitations on removal: (1) the rule that, in a diversity case, a defendant cannot remove a case from its home forum, § 1441(b); (2) the rule that a defendant cannot remove a diversity case once it has been pending in state court for more than a year, § 1446(b); and (3) the rule that all defendants must consent to removal, *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248, 20 S. Ct. 854, 44

L. Ed. 1055 (1900) (concluding that "all the defendants must join in the application" for removal); *Payne ex rel. Estate of Calzada*, 439 F.3d at 203 ("Failure of all defendants to join in the removal petition ... is ... an error in the removal process."). *See, e.g., Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 n.2 (9th Cir.2007); *see also* S. Rep. No. 109-14, at 48 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 45 ("[Section 1453] establishes the procedures for removal of interstate class actions over which the federal court is granted original jurisdiction in new section 1332(d). The general removal provisions currently contained in Chapter 89 of Title 28 would continue to apply to class actions, except where they are inconsistent with the provisions of the Act. For example, like other removed actions, matters removable under this bill may be removed only 'to the district court of the United States for the district and division embracing the place where such action is pending.'").

Accordingly, with this framework in place, we now turn to ATTM's arguments.

B.

In its notice of removal, ATTM contended that § 1441(a), which permits removal of a civil action over which the federal district courts have original jurisdiction by "the defendant or the defendants," permits ATTM, an additional counter-defendant, to remove the case to federal court. We do not agree.

In *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941), the Supreme Court considered the question of "whether the suit in which [a] counterclaim is filed is one removable by the [original] plaintiff to the federal district

court ...," *id.* at 103, 61 S. Ct. 868, under the statutory predecessor to § 1441(a), which provided that an action "may be removed by the defendant or defendants therein to the district court of the United States for the proper district," *id.* at 105 n.1, 61 S. Ct. 868. Although the Court acknowledged that, between 1875 and 1887, the removal statute allowed "either party" to remove the suit to federal court, *id.* at 104-05, 61 S. Ct. 868, the Court concluded that Congress "narrow[ed] the federal jurisdiction on removal" by amending the statute in 1887 to allow removal only "by the 'defendant or defendants' in the suit," *id.* at 107, 61 S. Ct. 868. Noting that interpretation of removal statutes "call[ed] for ... strict construction," *id.* at 108, 61 S. Ct. 868, the Court thus held that the original plaintiff against whom the original defendant had filed a counterclaim could not remove the case to federal court under § 1441(a)'s predecessor.

For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants-parties who are not the original plaintiffs but who would be able to exercise removal power under ATTM's interpretation. *See Cross Country Bank v. McGraw*, 321 F.Supp.2d 816, 821-22 (S.D. W.Va. 2004) (noting that district courts within the Fourth Circuit have adopted the majority rule that "a third-party defendant is distinct from 'the defendant or defendants' who are permitted to remove cases pursuant to 28 U.S.C. § 1441(a)"); *Galen-Med, Inc. v. Owens*, 41 F. Supp. 2d 611, 614 (W.D.Va.1999) ("The majority view, that third-party defendants are not 'defendants' for purposes of removal under 28 U.S.C. § 1441(a), is the better rule."); *Hayduk v. UPS*, 930 F. Supp. 584, 590 (S.D. Fla. 1996) ("Nearly every

court that has considered the question whether third-parties may remove under § 1441(a) has determined that they may not."); *Croy v. Buckeye Int'l, Inc.*, 483 F. Supp. 402, 406 (D. Md. 1979) ("The overwhelming weight of authority indicates that a third party defendant is not entitled to removal of an entire case to federal court under 28 U.S.C. § 1441(a)."); *Manternach v. Jones County Farm Serv. Co.*, 156 F. Supp. 574, 577 (N.D. Iowa 1957) (noting that courts "are not in disagreement as to the nonremovability of a third-party claim [under § 1441(a)]").

As the Sixth Circuit more recently explained, "[a]lthough *Shamrock Oil* is not dispositive of the precise issue before us, it does dictate that the phrase 'the defendant or the defendants,' as used in § 1441(a), be interpreted narrowly, to refer to defendants in the traditional sense of parties against whom the [original] plaintiff asserts claims." *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 462-63 (6th Cir. 2002) (noting that the American Law Institute has recommended that Congress "make[ ] clear what the present law merely implies: the right of removal applies only to the action as framed by the pleading that commences the action. Counterclaims, cross-claims, and third-party claims cannot be the basis for removal [under § 1441(a)]"); *see also Florence v. ABM Indus.*, 226 F. Supp. 2d 747, 749 (D. Md. 2002) ("[I]n adopting the current language [of the removal statute], Congress intended to restrict removal jurisdiction solely to the defendant to the main claim.").

Of course, additional counter-defendants, like third-party defendants, are certainly not defendants against whom the original plaintiff asserts claims. Thus, we easily conclude that an additional counter-

defendant is not a "defendant" for purposes of § 1441(a). *See, e.g., Capitalsource Fin., L.L.C. v. THI of Columbus, Inc.*, 411 F. Supp. 2d 897, 900 (S.D. Ohio 2005) (concluding that "additional counterclaim defendants ... are not defendants within the meaning of the removal statute. [and] do not have statutory authority ... to remove this case"); *Dartmouth Plan, Inc. v. Delgado*, 736 F. Supp. 1489, 1492 (N.D. Ill. 1990) ("But just as a third-party has no special rights to remove, neither does a nonplaintiff counter-defendant. A counterdefendant is not a defendant joined in the original action and therefore not a party that can remove a state action to federal court."); *Tindle v. Ledbetter*, 627 F. Supp. 406, 407 (M.D. La. 1986) (noting that because the Justices, who were joined as defendants on the counterclaim under Louisiana's procedural equivalent to Fed. R. Civ. P. 13(h), "are [additional] counterclaim defendants, they cannot remove this suit to federal court"); *see also* 16 James W. Moore et al., Moore's Federal Practice § 107.11[1][b][iv] (3d ed. 1998) (noting that the "better view" is that counter-defendants, cross-claim defendants, and third-party defendants "are not *defendants* within the meaning of [§ 1441(a)]").

Congress has shown the ability to clearly extend the reach of removal statutes to include counter-defendants, cross-claim defendants, or third-party defendants, *see* 28 U.S.C. § 1452(a) (West 2006) ("A *party* may remove any claim or cause of action ... [related to bankruptcy cases]." (emphasis added)). In crafting § 1441(a), however, Congress made the choice to refer only to "the defendant or the defendants," a choice we must respect. Thus, ATTM, as an additional counter-defendant, may not remove the

case to federal court under § 1441(a).[3] This conclusion is consistent with the well-established principle that "[w]e are obliged to construe removal jurisdiction strictly because of the significant federalism concerns implicated" and that "if federal jurisdiction is doubtful, a remand to state court is necessary." *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 260 (4th Cir. 2005) (internal quotation marks, citations, and alterations omitted); *see also Shamrock Oil*, 313 U.S. at 109, 61 S. Ct. 868 ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." (internal quotation marks omitted)).

C.

Perhaps anticipating our conclusion that an additional counter-defendant may not remove under § 1441(a), ATTM argues that § 1453(b) provides a removal power independent of that conferred in § 1441(a). ATTM further argues that, under the broad language of § 1453(b), any defendant, including a counter-defendant, may exercise that removal power. We need not decide whether § 1453(b) grants such a power because, even assuming that § 1453(b)

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[3] Shorts also contends that removal under § 1441(a) is impermissible because the district court does not have "original jurisdiction" over the case based on Palisades's complaint, which asserts only a state-law collection action for approximately $800, and because a counterclaim cannot serve as the basis for original jurisdiction in a diversity case such as this one. Given our conclusion that an additional counter-defendant may not remove under § 1441(a), we have no reason to address this argument.

grants a power of removal, ATTM, as an "additional counter-defendant," may not exercise this power.

ATTM argues that the broad language of § 1453(b) permits an additional counter-defendant to remove a class action to federal court for two reasons. First, ATTM contends that because § 1453(b) provides only that a class action "may be removed to a district court," it does not limit the parties entitled to remove. Second, ATTM contends that, in overriding several traditional limitations on removal, § 1453(b) twice refers to "any defendant," a phrase it believes is broad enough to include counter-defendants.

We find neither argument convincing. First, ATTM's contention that § 1453(b) grants it removal power because it does not expressly limit the parties who may remove simply does not comport with the language of § 1453(b) when the statute is read in its entirety. Given that the only reference in the statute as to a party who may remove is to a "defendant," and that the statute states that the class action may be removed "in accordance with [28 U.S.C. §] 1446," which specifically provides procedures for "[a] defendant or defendants" to remove cases to federal court, *see* § 1446(a), we think that Congress clearly did not intend to extend the right of removal to parties other than "defendant[s]." And, as discussed in Section II.B, "defendant" in the removal context is understood to mean only the original defendant.[4]

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[4] We note that ATTM's broad interpretation of § 1453(b) would necessarily allow an original *plaintiff/counter-defendant* to remove a class action asserted against it. The Ninth Circuit recently considered just such a situation in *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007), albeit in dicta. In

that case, the plaintiff argued that CAFA should be interpreted as "allowing a plaintiff forced to defend a class action on the basis of a cross-complaint to have the same right to remove the class action as a defendant." *Id.* at 1017. Concluding that "CAFA is not susceptible to such an interpretation," *id.*, the Ninth Circuit wrote:

> Although CAFA does eliminate three significant barriers to removal for qualifying actions, CAFA does not create an exception to *Shamrock's* longstanding rule that a plaintiff/cross-defendant cannot remove an action to federal court. CAFA's removal provision, section 1453(b), provides that "[a] class action may be removed to a district court ... in accordance with section 1446." Section 1446, in turn, sets forth the removal procedure for "[a] defendant or defendants desiring to remove any civil action ... from a State court." The interpretation of "*defendant or defendants*" for purposes of federal removal jurisdiction continues to be controlled by *Shamrock [Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)], which excludes plaintiff/cross-defendants from qualifying "defendants."
>
> Nor can we accept Progressive's invitation to read CAFA liberally as making a *sub silentio* exception to *Shamrock*. We have declined to construe CAFA more broadly than its plain language indicates. "Faced with statutory silence ..., we presume that Congress is aware of the legal context in which it is legislating." This presumption is especially appropriate here, where "[t]he legal context in which the 109th Congress passed CAFA into law features a longstanding, near-canonical rule" that a state plaintiff forced to defend on the basis of a cross-complaint is without authority to remove.
>
> Therefore, we must conclude CAFA does not alter the longstanding rule announced in *Shamrock* that precludes plaintiff/cross-defendants from removing class actions to federal court.

Id. at 1017-1018 (emphasis in original) (internal citations omitted). We agree that § 1453(b) should not be read to allow removal by original plaintiffs.

Second, the use of the phrase "any defendant" also does not grant removal power to additional counter-defendants. Section 1453(b) uses "any defendant" twice-first stating that a class action may be removed "without regard to whether *any defendant* is a citizen of the State in which the action is brought" and then stating that "such action may be removed by *any defendant* without the consent of all defendants."§ 1453(b) (emphasis added). The first provision eliminates the so-called "home-state defendant" restriction on removal found in § 1441(b), which is the rule that diversity actions "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."§ 1441(b). Of course, under the normal rules of statutory construction, "the same terms [should] have the same meaning in different sections of the same statute." *LaRue v. DeWolff, Boberg & Assocs.*, --- U.S. ----, 128 S. Ct. 1020, 1027, 169 L. Ed.2d 847 (2008) (internal quotation marks and alterations omitted). Thus, given that we have already concluded that "defendant" in § 1441(a) means only an original defendant, we must likewise conclude that "defendant" in § 1441(b) means only an original defendant. Because "we presume that Congress legislated consistently with existing law and with the knowledge of the interpretation that courts have given to the existing statute," *Strawn*, 530 F.3d at 297, that the first reference to "defendant" in § 1453(b) is in relation to § 1441(b)'s "home-state defendant" rule only reinforces our conclusion that "defendant" in § 1453(b) also means only the original defendant. *Cf. Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d. Cir. 2006) ("It is true that Congress displayed in CAFA an aim to broaden certain aspects of federal jurisdiction for class actions. However, we think that,

rather than evincing an intent to make as drastic a change to federal jurisdiction as Blockbuster proposes, CAFA's detailed modifications of existing law show that Congress appreciated the legal backdrop at the time it enacted this legislation.").

The statute's use of the word "any" to modify "defendant" does not alter our conclusion that additional counter-defendants may not remove under § 1453(b) because the use of the word "any" cannot change the meaning of the word "defendant." Likewise, § 1453(b)'s second use of the phrase "any defendant," i.e., "such action may be removed by *any defendant* without the consent of all defendants," § 1453(b) (emphasis added), eliminates the judicially-recognized rule of unanimous consent for removal; the use of the word "any" juxtaposed with the word "all" was intended to convey the idea of non-unanimity, not to alter the definition of the word "defendant."

Put simply, there is no indication in the language of § 1453(b) (or in the limited legislative history) that Congress intended to alter the traditional rule that only an original defendant may remove and to somehow transform an additional counter-defendant like ATTM into a "defendant" with the power to remove. Reading § 1453(b) to also allow removal by counter-defendants, cross-claim defendants, and third-party defendants is simply more than the language of § 1453(b) can bear.

Thus, we conclude that ATTM, as an additional counter-defendant, does not have a right to remove under either § 1441(a) or § 1453(b). Again, this conclusion is consistent with our duty to construe re-

moval jurisdiction strictly and resolve doubts in favor of remand.[5] *See Md. Stadium Auth.*, 407 F.3d at 260.

In an effort to overcome this plain language, ATTM stresses that " [i]t is inconceivable that Congress intended to leave [a] large category of class actions in state court." (Appellants' Br. at 25.) But, § 1332(d) itself leaves many class actions in state courts, *see, e.g., Luther v. Countrywide Home Loans Servicing L.P.*, 533 F.3d 1031 (9th Cir. 2008) (affirming remand of a class action to state court); *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804 (5th Cir. 2007) (same), and although we are cognizant of the fact that Congress clearly wished to expand federal jurisdiction through CAFA, we also recognize that it is our duty, as a court of law, to interpret the statute as it was written, not to rewrite it as ATTM believes Congress *could have* intended to

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[5] ATTM argues that this federalism-based canon of strict construction, which favors adjudication in state court, has no place in the interpretation of CAFA because Congress enacted CAFA to favor federal jurisdiction over qualifying class actions. This suggestion finds no support in our sister circuits. *See Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328-29 (11th Cir. 2006) ("Statements in CAFA's legislative history, standing alone, are a insufficient basis for departing from th[e] well-established rule [of construing removal statutes strictly and resolving doubts in favor of remand]."); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (applying the rule of strict construction of removal statutes to interpretation of CAFA); *see also Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 n.7 (10th Cir. 2005) ("We are mindful of the fact that Congress' goal in passing [CAFA] was to increase access to federal courts, and we also recognize that the Senate report instructs us to construe the bill's terms broadly. But these general sentiments do not provide *carte blanche* for federal jurisdiction over a state class action any time the statute is ambiguous."(internal citations omitted)).

write it. If Congress intended to make the sweeping change in removal practice that ATTM suggests by altering the near-canonical rule that only a "defendant" may remove and that "defendant" in the context of removal means only the original defendant, it should have plainly indicated that intent.

D.

Finally, ATTM argues that, if neither § 1441 nor § 1453(b) permits removal by an additional counter-defendant, then "the parties should be realigned so that ATTM is deemed a 'defendant' with the right of removal." (Appellants' Br. at 41.) Because the question of realignment concerns removal, and removal jurisdiction and realignment are "not severable for the purpose of determining the proper standard of review," *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1088 (6th Cir. 1992), we also review the district court's refusal to realign the parties *de novo*. Should our inquiry involve factual determinations made by the district court, we review those determinations for clear error. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 872-73 (9th Cir. 2000).

In determining whether to realign parties, we apply the "principal purpose" test: First, we determine the primary issue in controversy, and then we align the parties according to their positions with respect to the primary issue. *United States Fid. & Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 132-33 (4th Cir. 1995). "The determination of the 'primary and controlling matter in dispute' does not include the cross-claims and counterclaims filed by the defendants. Instead, it is to be determined by plaintiff's principal purpose for filing its suit." *Zurn Indus., Inc.*

v. Acton Constr. Co., 847 F.2d 234, 237 (5th Cir. 1988) (emphasis added).

Here, Palisades's "principal purpose" in filing the suit was to collect Shorts's debt. On that issue, Palisades and Shorts were properly aligned. Thus, like the district court, we conclude that realignment was inappropriate.

III.

We reiterate that our holding today is narrow: Under both § 1441(a) and § 1453(b), a counter-defendant may not remove a class action counterclaim to federal court. Congress is presumed to know the current legal landscape against which it legislates, and we are merely applying those pre-existing established legal rules. If Congress wants to overturn such precedent, it should do so expressly.

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

NIEMEYER, Circuit Judge, dissenting:

Palisades Collections LLC, a collection agency, commenced this action in West Virginia state court by filing a state-law debt collection case against Charlene Shorts for a $794.87 debt incurred by Shorts under her cell phone service contract with AT&T Mobility LLC. Shorts filed a class action counterclaim against Palisades Collections and joined AT&T Mobility LLC and AT&T Mobility Corporation (collectively "AT&T") as defendants. In the class action counterclaim, Shorts purported to represent 160,000 citizens of West Virginia, alleging that AT&T's cell phone service contracts violated the West Virginia Consumer Credit and Protection Act,

W. Va. Code § 46A-1-101 *et seq.* and demanding over $16 million in damages.

Relying on the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, AT&T removed the case to federal court. *See* 28 U.S.C. §§ 1332(d), 1453(b).

On Shorts' motion, the district court remanded the case to the West Virginia state court from which it was removed. The court found that Shorts' counterclaim class action met all of the jurisdictional requirements of CAFA embodied in 28 U.S.C. § 1332(d)(2) inasmuch as Shorts purported to represent a class of 160,000 West Virginia customers (well over the CAFA minimum of 100 class members); the class claimed in the aggregate a minimum of $16 million in damages (well over the CAFA minimum of $5 million); and minimum diversity, as required by § 1332(d)(2)(A), existed. Most of the class members are West Virginia citizens, whereas AT&T is a citizen of Georgia and Delaware, and Palisades Collections is a citizen of New Jersey and Delaware. See 28 U.S.C. § 1332(cc)(1). The district court also found inapplicable CAFA's home-state exception, which only applies when most class members have the same citizenship as one of the defendants. *See* 28 U.S.C. § 1332(d)(4). Although the district court thus found that it had removal *jurisdiction* under § 1332(d), it nonetheless held that CAFA did not give AT&T, as a *counter-claim* defendant, removal *authority* under 28 U.S.C. § 1453(b).

AT&T filed this interlocutory appeal under 28 U.S.C. § 1453(c), challenging the district court's ruling that because AT&T was a counterclaim defendant, it did not have removal authority under CAFA. Shorts supports the district court's conclusion that

CAFA did not provide AT&T with removal authority and also challenges the district court's finding of removal jurisdiction under § 1332(d).

The majority opinion agrees with the district court that a counterclaim defendant is not granted authority under CAFA, 28 U.S.C. § 1453(b), to remove a class action that otherwise meets the jurisdictional requirements of § 1332(d), and therefore it does not reach Shorts' jurisdictional argument.

For the reasons stated in this opinion, I conclude that CAFA does indeed authorize AT&T to remove this interstate class action, even though AT&T was sued as a counterclaim defendant, not as an original defendant. Section 1453(b), added by CAFA, expanded removal authority, conferring on "*any* defendant" the right to remove a "class action." And removal jurisdiction exists under 28 U.S.C. §§ 1332(d) and 1441, as found by the district court. Accordingly, I respectfully dissent.

I. Removal Authority

Removal of a case from state court to federal court is generally proper when (1) the federal court has removal *jurisdiction* and (2) the removing party has removal *authority*. Since the majority rests its judgment entirely upon AT&T's purported lack of removal authority, I begin with that issue.

The majority holds that AT&T may not remove the class action filed against it because, *and only because*, AT&T was sued as an additional defendant in a counterclaim, as distinct from being named an original defendant in an independent action. It concludes that because AT&T is a counterclaim defendant, it does not fall within the language "may be removed by *any* defendant" of § 1453(b) (emphasis

added). The majority's conclusion, I respectfully submit, is demonstrably at odds with this broad language.

Section 1441(a) states the general rule for removal authority, that civil actions, "of which the district courts of the United States have original jurisdiction, may be removed by *the* defendant or *the* defendants." 28 U.S.C. § 1441(a) (emphasis added). This language is the basis for both the rule that *all* defendants must unanimously consent to removal, *see Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 247, 20 S. Ct. 854, 44 L. Ed. 1055 (1900), and the rule that only *original* defendants can remove, *see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-08, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). But 28 U.S.C. § 1453(b), which was added by CAFA, provides a different rule for removal of class actions over which the district court has removal jurisdiction. It states that a class action "may be removed by *any* defendant without the consent of all defendants" (emphasis added). This language expands removal authority in the CAFA context.

Shorts and the majority agree that § 1453(b) does expand removal authority, but just not far enough to reach the present case. For example, § 1453(b) expands removal authority by allowing removal "without regard to whether any defendant is a citizen of the State in which the action is brought." They acknowledge that this modifies § 1441(b)'s home-state rule, which denies removal authority whenever at least one defendant resides in the State whose court has the case.

Similarly, I submit that § 1453(b), in authorizing removal "by *any* defendant," also expands removal authority beyond the limits of § 1441(a) so that it in-

cludes any defendant joined as an additional defendant to a counterclaim, as well as any *counterclaim* defendant. As the Supreme Court has repeatedly noted, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " *Ali v. Fed. Bureau of Prisons*, --- U.S. ----, 128 S. Ct. 831, 835-36, 169 L. Ed. 2d 680 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976))). A *counterclaim* defendant is certainly a "kind" of defendant and falls easily within "indiscriminately of whatever kind" of defendant. The plain language of § 1453(b) thus gives AT&T, as a kind of defendant, authority to remove the class action in this case from state court to federal court.

Both Shorts and the majority argue that we should read the word "any" narrowly, based upon the *exclusive* congressional purpose perceived to exist behind the entire clause. But neither Shorts nor the majority cite any statutory language or legislative history to support their articulation of CAFA's exclusive purpose in authorizing *any* defendant to remove a class action. They maintain simply that in using "any defendant" in § 1453(b), Congress intended to overrule *only* the long-standing requirement that defendants must unanimously consent to removal. *See Martin*, 178 U.S. at 247, 20 S. Ct. 854. And in making this point, they argue that the "any defendant" language of § 1453(b), for some unexplained reason, does not modify the rule announced in *Shamrock Oil*, 313 U.S. at 106-08, 61 S. Ct. 868, that counterclaim defendants who are also plaintiffs cannot remove under § 1441(a).

I agree with Shorts and the majority that § 1453(b)'s "any defendant" language expands removal authority by abolishing *Martin's* unanimous consent rule in the CAFA context. But I maintain that the same clause also abolishes the *Shamrock Oil* rule for CAFA purposes. Not only is the language of § 1453(b) clear here, but also both *Shamrock Oil* and *Martin* were based on the exact same language in § 1441(a)'s predecessor.[1] It seems implausible at best that the § 1453(b) language abolished the *Martin* rule while leaving untouched the *Shamrock Oil* rule, especially when both rules depended on the same language.

In both *Martin* and *Shamrock Oil*, the Supreme Court based its holding on the statutory interpretation of the wording "the defendant or defendants" in § 1441(a)'s prior codifications, 28 U.S.C. § 71 (1940) (the codification at the time of *Shamrock Oil*), and Act of August 13, 1888, 25 Stat. 433, ch. 866, § 2 (the location at the time of *Martin*).[2] The *Martin* court found the unanimity rule plain:

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[1] The decision in *Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014, 1017 (9th Cir. 2007), is not persuasive to reach a contrary conclusion as it forces *Shamrock Oil's* interpretation of § 1441(a)'s "*the* defendant or defendants" onto § 1446(a)'s "*a* defendant or defendant," which *Shamrock Oil* did not interpret. Yet, "[i]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.' " *American Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000). Section 1446, moreover, neither creates nor alters removal authority, being entirely procedural, as suggested by its title, "Procedure for Removal."

[2] Congress added the second "the" in "the defendant or *the* defendants" as part of a modernization of § 1441's language. See

> It thus appears on the face of the statute that if a suit arises under the Constitution or laws of the United States, or if it is a suit between citizens of different States, *the* defendant, if there be but one, may remove, or *the* defendants, if there be more than one.
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> * * *
>
> And in view of the language of the statute we think the proper conclusion is that all the defendants must join in the application....

178 U.S. at 247, 248, 20 S. Ct. 854 (emphasis added). And *Shamrock Oil* relied upon Congress' deliberate replacement in 1887 of "either party" with "the defendant or defendants" in finding that counterclaim defendants who are also plaintiffs cannot remove. *See* 313 U.S. at 106-07, 61 S. Ct. 868.

Even though both the unanimity rule of *Martin* and the original defendant rule of *Shamrock Oil* derive from the same language in § 1441(a), the majority asserts that § 1453(b)'s "any defendant" language abolishes one but not the other. We should hesitate before attributing such acrobatic skill to Congress.

Shorts and the majority contend that "defendant" should be read consistently throughout §§ 1441 and 1453 and that because "the defendant" in § 1441(a) refers to the *original* defendant, "any defendant" in § 1453(b) should also refer to the original defendant. *See, e.g.*, *ante* at __. But reading "defendant" consistently does not mean we must read "*any* defendant" in § 1453(b) the same as "*the* defendant or *the* defendants" in § 1441(a). Surely one is not construing "de-

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Act of June 25, 1948, ch. 646, 62 Stat. 937; 28 U.S.C.A. § 1441 note (2008).

fendant" differently when one finds "*any* defendant" has a different meaning from "*the* defendant or *the* defendants." The article "the" *restricts* the noun that follows, while the article "any" expands its meaning. *See Reid v. Angelone*, 369 F.3d 363, 367 (4th Cir. 2004); *accord Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003) ("the" has a narrowing effect, while "any" would have a broadening effect). Moreover, the majority seems to recognize the difference in meaning between "any defendant" and "the defendant" when it states that "any defendant" overrules the *Martin* rule, which had depended on the phrase, "the defendant." *See ante* at __.

The majority's assertion that in both § 1441(a) and § 1453(b) the word "defendant" means only "original defendant" is both puzzling and potentially unsettling to existing interpretations of jurisdictional statutes. The majority opinion applies the logic that because "the defendant" in § 1441(a) refers to the original defendant, as held by *Shamrock Oil*, "any defendant" must likewise mean only original defendant because both terms use the word "defendant." I conclude that the majority takes this misstep only in an effort to import the *Shamrock Oil* rule into the CAFA context. Yet, *Shamrock Oil* did not state that the word "defendant" itself means "original defendant." Rather, it held that "the defendant or defendants," when adopted by Congress to replace "either party" in the earlier statute, refers to the original defendant and not a counterclaim defendant *who was also the plaintiff*. 313 U.S. at 106-08, 61 S. Ct. 868.[3]

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[3] Insofar as AT&T was first joined in the action by the filing of a class action complaint against it and by service of that complaint and process upon it, the action as to AT&T began with

The majority contends additionally that the language following "any defendant," which provides that a class action may be removed "without the consent of all defendants," was the basis by which § 1453(b) overruled *Martin*. To reach this conclusion, the majority finds that the text "without the consent of all defendants" somehow reads back and narrows the meaning of "any defendant." But such a reading is not grammatically supportable. The "without the consent of all defendants" language does not restrict "any defendant," but rather expands removal authority; "without the consent of all defendants" modifies the verb "may be removed" and not the noun "any defendant," thus eliminating the requirement that AT&T get "the consent of all defendants," a group that undoubtedly would include Shorts, who clearly did not want the case removed.

The error in the majority's reading of "without the consent of all defendants" becomes apparent when one takes the full clause of § 1453(b) and substitutes for "any" the Supreme Court's definition of "any," and for the parties, the names of the parties in this case. Thus, the full clause of § 1453(b) would provide that the class action "may be removed by

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that class action complaint, in which it was joined only in its capacity as a defendant. Unlike Palisades, which commenced the collection action in state court and thus was *both a plaintiff and a counterclaim defendant*, AT&T in this case is only a defendant. Because AT&T was not also a plaintiff, the *Shamrock Oil* rule, which denied a defendant who was also a plaintiff the authority to remove, would appear not to be applicable to AT&T even apart from the amendments made by CAFA. *See Shamrock Oil, 313 U.S. at 106*-08, 61 S. Ct. 868; Fed. R. Civ. P. 13(h) note to 1966 Amendment (For purposes of applying joinder of additional parties to a counterclaim, "the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be").

['one or some indiscriminately of whatever kind' of] defendant [which includes the counterclaim defendant AT&T] without the consent of all defendants [which includes the defendant Shorts]."

Shorts and the majority argue that in adopting their construction of §§ 1441(a) and 1453(b) they are following the canon that courts strictly construe federal jurisdictional statutes and that their construction, in denying AT&T removal authority, eliminates the possibility of removal by all counterclaim defendants in qualifying class actions. But in purportedly applying the canon, they overlook the fact that the canon cannot defeat the plain meaning of the statutory language. "We must not give jurisdictional statutes a more expansive interpretation than their text warrants; but it is just as important not to adopt an artificial construction that is narrower than what the text provides." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (citation omitted). Moreover, the canon applies with less force in this case because the justifications for the canon are not present in view of Congress' explicit purposes for enacting CAFA.

The Supreme Court first annunciated the canon of strict interpretation of federal jurisdictional statutes in *Healy v. Ratta*, 292 U.S. 263, 269-70, 54 S. Ct. 700, 78 L. Ed. 1248 (1934), and reiterated it as an additional basis for its ruling in *Shamrock Oil*. In both *Shamrock Oil* and *Healy*, the Court gave two reasons for applying the canon of strict construction. First, the Court observed that successive acts of Congress had constricted federal jurisdiction, evincing a clear congressional policy to narrow federal jurisdiction. *See Shamrock Oil*, 313 U.S. at 108, 61 S. Ct. 868; *Healy*, 292 U.S. at 269-70, 54 S. Ct. 700.

Second, in both *Shamrock Oil* and *Healy*, the Court stated that federalism principles required strict construction of encroachment on state court jurisdiction. *Shamrock Oil*, 313 U.S. at 108-09, 61 S. Ct. 868; *Healy*, 292 U.S. at 270, 54 S. Ct. 700.

But neither of these rationales applies with any force in this case. First, CAFA unquestionably expanded federal jurisdiction and liberalized removal authority, *see Johnson v. Advance America, Cash Advance Centers of South Carolina, Inc.*, 549 F.3d 932, 935, 937-38 (4th Cir. 2008), thus reversing the restrictive federal jurisdiction policies of Congress that both *Healy* and *Shamrock Oil* listed as the primary justification for application of the canon. Second, CAFA § 2 addresses the federalism principle, stating that Congress intended the extension of federal jurisdiction over large interstate class actions and liberalization of removal to *further* the proper balance of federalism and "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2), Pub. L. No. 109-2, 119 Stat. 4-5 (2005); *Johnson*, 549 F.3d 932, 935, 937-38. Unlike the generalized legislative history referenced in *Shamrock Oil* and *Healy* and by the majority, this stated purpose for expanding federal jurisdiction and liberalizing removal in the CAFA context is part of the statutory text, and federal courts surely have an obligation to heed it.

The Supreme Court recently relied upon similar statutory statements of findings and purposes in rejecting an artificial reading of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*,

547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006), the Court interpreted the words "in connection with the purchase or sale" of securities, as contained in SLUSA. The plaintiff Dabit argued for an artificially narrow reading of the words, premised on the canon against finding federal preemption of state law. *Id.* at 84, 126 S. Ct. 1503. That canon, like the canon of strict interpretation of jurisdictional statutes, derived partly from federalism concerns. But, based largely on SLUSA's purposes, as stated in SLUSA § 2, the Court unanimously gave the statute its natural reading, even though that reading had the effect of significantly preempting more state law. *Id.* at 82, 86, 87-88, 126 S. Ct. 1503. Under a similar analysis, this court should give "any defendant" used in 28 U.S.C. § 1453(b) its natural reading.

I conclude that the plain language of § 1453(b) grants removal authority to AT&T in this case. Section 1453(b)'s "any defendant" language could not have overruled one rule derived from the phrase "the defendants" in § 1441(a) but not another rule derived from the same statutory language in the same statute. And when one also considers the expansive meaning given to "any" by the Supreme Court, the natural reading of the plain language of § 1453(b) unambiguously grants AT&T removal authority.

II. Removal Jurisdiction

Because I conclude that AT&T has removal authority, I must also determine whether the district court correctly found it had removal jurisdiction.

Section 1332(d)(2) confers original jurisdiction on district courts over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a

class in which any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). The district court concluded and Shorts acknowledges that the class action counterclaim in this case meets the requirements of § 1332(d)(2) insofar as it alleges the jurisdictional amount ($5 million) and diversity of citizenship (minimal diversity). Shorts contends, however, that the class action *counterclaim* in this case is not "any civil action" over which § 1332(d)(2) grants jurisdiction to district courts. She states, "A counterclaim is not a 'civil action.' Rather, a civil action arises from the plaintiff's original claims," citing Federal Rule of Civil Procedure 3 ("A civil action is commenced by filing a complaint with the court").

In state court, Palisades Collections, as a plaintiff, filed a collection claim against Shorts, as a defendant. Shorts, as a counterclaim plaintiff, then filed a class action against Palisades Collections, as a counterclaim defendant, and against AT&T, as an additional defendant joined under the West Virginia analog to Federal Rule of Civil Procedure 13(h). *See* Fed. R. Civ. P. note to 1966 Amendment ("the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be"). Thus, while Palisades Collections is the plaintiff and Shorts the defendant in the original collection action, Shorts is the class action plaintiff, representing 160,000 class plaintiffs against Palisades Collections and AT&T, as class action defendants. I conclude that Shorts' claim on behalf of 160,000 against Palisades Collections and AT&T is a class action over which CAFA confers jurisdiction.

In using the term "any civil action" in § 1332(d)(2), where Congress granted jurisdiction to

the district courts in CAFA, Congress used a term of art created by the Federal Rules of Civil Procedure to merge all actions and causes of actions, whether claims for damages, injunctive relief, and other relief, and whether at law or in equity. With that merger, a plaintiff now claims, in one action, without stating separate "causes of action," claims for damages, injunctive relief and other relief. *See* Fed. R. Civ. P. 2 ("There is one form of action—the civil action").

The effect of this rule was to streamline all pleading by eliminating the numerous earlier requirements such as stating causes of action and transferring claims between law and equity. At the same time Rule 2 was adopted, the Advisory Committee provided an instructional note to the Rule: "Reference to actions at law or suits in equity *in all statutes* should now be treated as referring to the civil action prescribed in these rules." Fed. R. Civ. P. 2 note 2 (emphasis added). Congress complied with this instruction when referring in § 1332(d)(2) to a class action as a civil action.

That a class action in whatever form is a civil action was indicated early by the Supreme Court soon after it adopted the rules in 1937. As the Court stated, "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." *Hansberry v. Lee*, 311 U.S. 32, 41, 61 S. Ct. 115, 85 L. Ed. 22 (1940). Thus, the class action, once a form of suit in equity, became with the enactment of Rule 2, a civil action. Indeed, the text of Rule 23, regulating class actions generally, confirms this. *See*,

e.g., Fed. R. Civ. P. 23(c)(1)(A) ("whether to certify *the action* as a class action"); *id.* 23(d) ("Conducting *the Action*"); *id.* 23(d)(1) ("in conducting *an action* under this rule"); *id.* 23(d)(1)(B)(i) ("any step in *the action*"); *id.* 23(d)(1)(B)(iii) ("otherwise come into *the action*"); *id.* 23(g)(1)(A)(ii) ("the types of claims asserted in *the action*") (emphases added throughout). As recognized in *Hansberry v. Lee* from the history of class actions, a class action is available in conformity with the usual rules of procedure as practicable, whether by complaint, counterclaim, cross-claim, or third-party claim. Indeed, Shorts herself must recognize this as she brought her class action as a counterclaim.

Shorts, of course, does not maintain that her class action counterclaim is barred simply because she brought it as a counterclaim. She undertook, in filing the class action, to seek certification of "the action" as a class action. *See* West Virginia Rule 23(c)(1)(A) (containing the same language as the Federal Rules counterpart). That rule provides that "the court must determine by order whether to certify *the action* as a class action." This applies to Shorts' class action counterclaim. Shorts therefore cannot credibly claim that her class action counterclaim is not an action and thus a "civil action" under Rule 2.

Courts have reached a similar conclusion in the context of 28 U.S.C. § 1442, which authorizes the removal of "a civil action" against federal officers and agencies. Implementing the authority granted by § 1442, which authorizes removal of "a *civil action* ... commenced in a State court against" a federal official or agency, courts have found removal jurisdiction when those federal officials or agencies were first

brought into the case through a *third-party complaint*. *See Johnson v. Showers*, 747 F.2d 1228 (8th Cir. 1984); *IMFC Professional Servs. of Fla., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152 (5th Cir. 1982). While these holdings might be justified in part by the federal policy encouraging federal-court resolution of claims against federal officers and agencies, Congress has also announced a similar federal policy in CAFA in favor of federal-court resolution of class actions such as this one. Section 2(b) of CAFA states that Congress intended CAFA to "restore the intent of the framers of the United States Constitution by providing for *Federal court consideration* of interstate cases of national importance under diversity jurisdiction." (Emphasis added).

Shorts' reliance on Federal Rule of Civil Procedure 3, stating that "[a] civil action is commenced by filing a complaint with the court," is misplaced, as that rule addresses when an action commences for purposes of federal statutes of limitations and similar time-related provisions. *See* 4 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §§ 1051, 1056 (3d ed. 2002).

As the district court concluded, the requirements for original jurisdiction set forth in 28 U.S.C. § 1332(d)(2) are fulfilled, and when combined with 28 U.S.C. § 1441(a), the district court is granted removal jurisdiction. Accordingly, I would conclude that the district court had removal jurisdiction over this interstate class action, a conclusion that is entirely consonant with Congress' purposes in enacting CAFA, expressed in the statutory text, at CAFA § 2, Pub. L. No. 109-2, 119 Stat. 4, 5 (2005).

III

The majority correctly recognizes that Congress does not *sub silentio* disturb preexisting legal principles for removal jurisdiction and authority. *See Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 297 (4th Cir. 2008). But when new statutory language, added by CAFA, modifies preexisting language, the new language must control. *Id.* The majority, however, fails to apply the new language. Section 1453(b), by authorizing "any defendant" to remove, makes *Shamrock Oil* inapplicable in the CAFA context, thus giving AT&T removal authority. And the language of §§ 1332(d)(2) and 1441 gives the district court removal jurisdiction. Accordingly, I would reverse the district court's remand order to let this interstate class action proceed in federal court, as CAFA clearly provides.

ORDER

Jan. 15, 2009

The Court denies appellants' petition for rehearing en banc. No member of the Court requested a poll on the petition for rehearing en banc. Judge Niemeyer filed an opinion dissenting from the denial of rehearing en banc.

Entered at the direction of Chief Judge Williams.

NIEMEYER, Circuit Judge, dissenting from the denial of rehearing en banc:

While I find the petition for rehearing persuasive, I do not request a poll of the court. Because there is a respectable division of opinion on the issue of whether a party joined as an additional defendant to a counterclaim has rights under the Class Action Fairness Act, I prefer to release this case to the early

consideration of the Supreme Court. This is an important issue of statutory interpretation, and the majority's interpretation creates an unfortunate loophole in the Class Action Fairness Act that only the Supreme Court can now rectify.

APPENDIX B

United States District Court,
N.D. West Virginia.

PALISADES COLLECTIONS LLC, Plaintiff and Counterclaim Defendant,

v.

Charlene SHORTS, Defendant and Counterclaim Plaintiff,

v.

Palisades Collections LLC, AT&T Mobility LLC and AT&T Mobility Corporation, Counterclaim Defendants.

Civil Action No. 5:07CV098.

Jan. 29, 2008.

William D. Wilmoth, Steptoe & Johnson, PLLC, Wheeling, WV, for Plaintiff and Counterclaim Defendant.

Christopher J. Regan, James G. Bordas, Jr., Jason E. Causey, Bordas & Bordas, PLLC, Thomas E. McIntire, Thomas E. Mcintire & Associates, LC, Wheeling, WV, Jonathan Bridges, Mazin Sbaiti, Susman Godfrey, LLP, Dallas, TX, for Defendant and Counterclaim Plaintiff.

Christina S. Terek, Jeffrey M. Wakefield, Flaherty, Sensabaugh & Bonasso, PLLC, Wheeling, WV, for Counterclaim Defendants.

CORRECTED MEMORANDUM OPINION AND ORDER[1]

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[1] The corrections in this Order affect neither the substance of the analysis nor the outcome of the case.

IRENE M. KEELEY, District Judge.

The issue pending before the Court is whether the counterclaim defendants in this case, AT&T Mobility LLC and AT&T Mobility Corporation (jointly "ATTM"), may remove a putative class action from state to federal court. Because the counter-claim defendants do not have that authority, and because CAFA does not create an independent basis for removal, the Court grants defendant Charlene Shorts' ("Shorts") motion to remand the case to the Circuit Court of Brooke County, West Virginia.

I. FACTS AND PROCEDURAL HISTORY

Shorts purchased a cellular phone and wireless phone service from Cingular Wireless LLC ("Cingular"). Shorts' contract provided that if she defaulted on her payment obligations before the end of the contract term, Cingular would charge her $150.00 in early termination fees. In October 2004, Cingular merged with AT&T Wireless Services, Inc. to become AT&T Mobility LLC ("AT&T"). Before Shorts' contract ended, AT&T determined that she was in default on her account, and, thus, terminated her service and charged her the early termination fee.

In June 2005, AT&T assigned its right to collect on Shorts' default to Palisades Collection LLC ("Palisades"). A year later, on June 23, 2006, Palisades initiated a collection action against Shorts in the Magistrate Court for Brooke County, West Virginia.

Palisades then removed the case from the magistrate court to the Circuit Court of Brooke County. On July 14, 2006, Shorts filed her answer and also counterclaimed against Palisades for violations of the West Virginia Consumer Credit & Protection Act ("the Act"). Almost one year later, on May 16, 2007,

Shorts moved for leave to file a first amended counterclaim, joining AT&T as an "additional counterclaim defendant." The circuit court heard oral argument on this amended counterclaim on June 4, 2007, and, on June 26, 2007, granted the motion and ordered that the amended counterclaim be deemed filed as of June 4, 2007. The new counterclaim defendants, AT&T Mobility LLC and AT&T Mobility Corporation, were served with the amended counterclaim on July 13, 2007.[2]

In her amended counterclaim, Shorts alleged that Palisades and ATTM violated the Act by systematically contracting for, charging, attempting to collect, and collecting illegal default charges in excess of the amounts allowed by W.Va. Code § 46A-2-115(a), and by imposing unconscionable charges in violation of W.Va. Code § 46A-2-121.

Not long after filing the amended counterclaim, Shorts filed a motion for class certification, seeking to represent a class of individuals with similar contracts with Cingular and AT&T. Before the Brooke County Circuit Court could rule on that motion, however, ATTM removed the case to this Court.

As a basis for removal jurisdiction, ATTM relies on the Class Action Fairness Act of 2005 ("CAFA"),

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[2] There appears to be some confusion as to the identity of the counterclaim defendants. Although Shorts named only Palisades and AT&T Mobility LLC in her counterclaim, AT&T Mobility Corporation joined with AT&T Mobility LLC in removal and again in the memorandum in opposition to Shorts' motion to remand. Thus the Court is treating AT&T Mobility Corporation as a "counterclaim defendant" in conjunction with AT&T Mobility LLC, and refers to both the AT&T Mobility entities jointly as "ATTM."

Pub. L. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of Title 28 of the United States Code), which grants federal courts jurisdiction over qualifying class actions. Specifically, to meet CAFA requirements, the class must meet minimal diversity requirements, the aggregate amount in controversy must exceed $5,000,000.00, and the class must contain 100 or more members. *See* 28 U.S.C. §§ 1332(d)(2)(A), 1332(d)(5)(B), 1332(d)(6) (2005).

Shorts responded to ATTM's removal of the case by filing this motion to remand on August 6, 2007. She argues that ATTM cannot remove this case because it is not a "defendant" pursuant to 28 U.S.C. § 1441 (2002) ("§ 1441"), the statute providing for removal of state cases to federal court. ATTM asserts that this Court must look beyond the title "counterclaim defendant" to determine removal authority, or, alternatively, that CAFA should be interpreted as creating a basis for removal in this case. The two issues before the Court, therefore, are (1) whether ATTM is a defendant for purposes of removal, and (2) whether CAFA provides an independent basis for removal.

III. LEGAL ANALYSIS

A. REMOVAL UNDER 28 U.S.C. § 1441

It is well-established that, in a dispute over removal of a case to federal court, the party seeking removal bears the burden of establishing that federal jurisdiction is proper. *E.g. Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004). In addition, courts are

> obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated. Therefore, '[i]f federal

> jurisdiction is doubtful, a remand [to state court] is necessary.'

Id. (quoting *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994)). ATTM, therefore, bears the burden of establishing jurisdiction in this Court, and any doubts should be resolved in favor of remand.

A "defendant" in a state case may remove the action to federal court if either federal question or diversity jurisdiction is present. 28 U.S.C. § 1441. As detailed below, the Court agrees that this putative class action meets the jurisdictional requirements of CAFA, and thus federal subject matter jurisdiction exists. This Court may, therefore, properly retain jurisdiction if it determines that ATTM has the authority to remove. Accordingly, the definitive issue is whether ATTM is a "defendant" under the statute.

United States Code Title 28 section 1441 provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). Shorts argues that courts have interpreted § 1441(a) as excluding "counterclaim defendants" from among those defendants who may remove an action to federal court. She cites long-standing Supreme Court precedent holding that, in an action in which the original defendant counterclaims against the original plaintiff, the plaintiff

(now counterclaim defendant) is not a defendant for the purpose of removal under the statute. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

Shorts next relies on several district court cases from various circuits, discussed *infra*, for the proposition that even an "additional counterclaim defendant" is not a "defendant" under § 1441(a) and, therefore, is barred from removing the case. An "additional counterclaim defendant" is a defendant named in a counterclaim who was not an original plaintiff in the case and, instead, is a new party brought into the suit by the counterclaim.

ATTM contends that it should not be barred from removing the case because it was not a party to the original action. It admits that it was added as a "counterclaim defendant" pursuant to West Virginia Rules of Civil Procedure 13(h) and 20, and it does not ask the Court to undo the state court's ruling. Instead, ATTM asks the Court to find, solely for the purpose of allowing removal, that it was improperly joined as a "counterclaim defendant," and, instead, to consider it a "true defendant" who can remove.

1. ATTM is properly joined as an "additional counterclaim defendant."

Legal characterizations of a party's status as stated in a complaint are not controlling; rather the Court must look at the factual allegations, or, in this case, the nature of the proceedings that have already occurred, to determine a party's proper status. *See The Dartmouth Plan, Inc. v. Delgado v. The Dartmouth Plan, Inc., et al.*, 736 F. Supp. 1489, 1491 (N.D. Ill. 1990). Furthermore, "[i]n determining the removing parties' proper characterization, federal law controls." *Id.* (citing *Chicago, Rock Island & Pa-*

cific R.R. v. Stude, 346 U.S. 574, 579-80 (1954) ("For the purpose of removal, the federal law determines who is plaintiff and who is defendant.")).

In this case, Shorts joined ATTM as a "counterclaim defendant" pursuant to West Virginia Rules of Civil Procedure 13(h) and 20. Rule 13(h), which is identical to the parallel federal rule, states that "[p]ersons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20." Applicable here is Federal Rule 20, which provides for permissive joinder of parties. Rule 20(a) states, in part,

> All persons ... may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of occurrences, and if any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 20(a)(2007).

It is well established that joinder under Rule 13(h) may only be invoked if a new party is being joined with an existing party in a counterclaim or cross-claim that lies against both the new and existing parties. 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 1434, 1435 (2d ed. 1990); *see also* 3 JAMES WM. MOORE ET AL, MOORE'S FEDERAL PRACTICE ¶ 13.112 (3d ed. 1997). In *Dartmouth*, a district court in the Northern District of Illinois explained the status of a party joined by the original defendant through Rule 13(h):

> A counterclaim is any suit by a defendant against the plaintiff including any claims properly joined with the claims against the plaintiff. *See* Fed. R. Civ. P. 13(a)(c). A counterdefendant need not also be a plaintiff. *See* Fed. R. Civ. P. 13(h).

736 F. Supp. at 1491. Thus, the counterclaim defendant may be a new party that is brought in for the first time on the counterclaim, as long as the claims against the new party are properly joined with the claims against the original party.

In her amended counterclaim, Shorts asserted a claim against Palisades under West Virginia law, challenging its attempts to collect her debt. She alleged that the debt is partially made up of illegal fees. In the same amended counterclaim, Shorts joined ATTM, arguing that it contracted for, charged, and attempted to collect the same illegal fees. In other words, Palisades sued Shorts to collect fees, after which Shorts counterclaimed on the basis that the fees are illegal. She then joined ATTM on the basis that they too are liable for the illegal fees, given that they had contracted for the fees, attempted to collect them, and then ultimately assigned the right to collect them to Palisades.

Because Shorts asserts that both Palisades and ATTM have violated West Virginia law, and are therefore liable to Shorts and the other putative class members, the Court finds that ATTM is properly characterized as a counterclaim defendant.

2. Additional counterclaim defendants may not remove.

As a counterclaim defendant, ATTM does not have authority to remove the action to federal court.

In a case that is factually and procedurally similar to this one, a district court found that additional counterclaim defendants do not have removal authority. *Dartmouth*, 736 F. Supp. at 1492. In *Dartmouth*, the original defendants, Mr. and Mrs. Delgado, obtained a mortgage on their home from The Dartmouth Plan, Inc. ("Dartmouth"). *Id.* at 1490. Dartmouth sold that mortgage to National City Bank, but continued to service the mortgage. *Id.* After the Delgados stopped making payments on the mortgage, Dartmouth brought a foreclosure action in state court. *Id.* In response, the Delgados counterclaimed against Dartmouth and added National City Bank and two other companies as additional counterclaim defendants, alleging a class action lawsuit in violation of Illinois state consumer laws. *Id.* National City Bank and the other additional counterclaim defendants (termed "counterdefendants" by the district court) removed the action to federal court. *Id.* at 1491.

In holding that the counterdefendants did not have authority to remove, the district court first considered the argument that "a counterdefendant who is not a plaintiff does not voluntarily choose to bring suit in a state court and thus can be viewed in a different light than the counterdefendant who is also a plaintiff." *Dartmouth*, 736 F. Supp. at 1492. In rejecting this position, the court found that "federalism principles and the language of § 1441 militate against allowing a third-party action to bring otherwise nonremovable claims into federal court with it" and "just as a third-party has no special rights to remove, neither does a nonplaintiff counterdefendant." *Id.* The court concluded that "a counterdefendant is not a defendant joined in the original action and therefore not a party that can remove a state action to federal court." *Id.*

Employing a similar analysis, other district courts also have held that additional counterclaim defendants may not remove. In *Capitalsource Finance, LLC v. Thi of Columbus, Inc., et al.*, for example, a district court in the Southern District of Ohio found:

> [T]he counterclaim defendants do not have statutory authority under the removal statutes to remove this case. Although the Court recognizes that the removing parties, unlike the typical plaintiff/counterclaim defendant, did not choose in the first instance to litigate their claims in the state court, the presumption against removal jurisdiction and the need to construe the removal statute narrowly and not liberally precludes a finding that they are 'defendants' with a right to remove.

411 F. Supp. 2d 897, 900 (S.D. Ohio 2005). Similarly, in *OPNAD Fund, Inc., et al. v. Watson*, a district court in the Southern District of Mississippi ruled that McDonald's Corporation ("McDonald's"), which was added to the case as an additional counterclaim defendant, did not have authority to remove because it was not a defendant within the meaning of the removal statute. 863 F. Supp. 328, 332 (S.D. Miss. 1994).

Based on the reasoning in Dartmouth and the other cases discussed above, the Court finds that, as an additional counterclaim defendant, ATTM may not remove this case to federal court because it is not a "defendant" for purposes of removal under § 1441.

3. Realignment of the parties is not appropriate.

Alternatively, ATTM requests the Court to realign the parties and place Shorts in the position of plaintiff and ATTM in the position of "real defendant." ATTM correctly asserts that federal courts may review the alignment of the parties and reconsider their proper status for the purpose of allowing removal:

> Federal law determines who is a plaintiff and who is a defendant for purposes of applying the removal statute, and the federal court may realign the parties according to their real interests, as it can in a case originally instituted in a federal court, before deciding whether a true 'defendant' is seeking removal to federal court.

WRIGHT & MILLER, *supra*, § 3731.

In *Mason City & Fort Dodge Railroad Company v. Boynton*, 204 U .S. 570 (1907), "the Supreme Court articulated a functional test for determining which party is the defendant for purposes of removal." *Spragins' Estate v. Citizens Nat. Bank of Evansville*, 563 F. Supp. 424, 425-26 (D.C. Miss. 1983).[3] Under that test, "the plaintiff is the party whose intent to achieve a particular result, such as the recovery of property or money, is the mainspring of the proceedings, and who is responsible for the continued exis-

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[3] Interestingly, while district courts have applied the "functional test" in various types of actions, "the Supreme Court has applied its functional test solely in the context of condemnation proceedings." *Cross Country Bank v. McGraw*, 321 F. Supp. 2d 816, 823 (S.D. W.Va. 2004).

tence of the action." *CitiFinancial, Inc. v. Lightner*, No. 5:06CV145, 2007 WL 1655225, *2 (N.D. W.Va. June 6, 2007) (quoting *Estate of C.A. Spragins v. Citizens Nat'l Bank of Evansville*, 563 F. Supp. 424, 425-26 (N.D. Miss. 1983)) (internal quotations omitted).

ATTM asserts that the "mainspring" of this action is the putative class action, rather then the original debt collection action. Very little support exists for this interpretation, however, and the only case cited by ATTM in support of this proposition, *Miller v. Washington Workplace, Inc.*, 298 F. Supp. 2d 364 (E.D. Va. 2004), was later criticized and rejected for its lack of analysis and poor reasoning. *See Williamsburg Plantation, Inc. v. Bluegreen Corp.*, 478 F. Supp. 2d 861, 865 (E.D. Va. 2006).

In *Miller*, the district court briefly reviewed the procedural history of the case, explaining that Washington Workplace initiated the action by filing a motion for judgment against Miller for breach of contract. *Id.* at 369. Miller responded by filing counterclaims against Workplace and third-party claims against a new party, Murphy. *Id.* Workplace and Murphy then removed the action to federal court, asserting federal question jurisdiction. *Id.* No motion to remand was filed. Instead, Miller, the original defendant, asked the Court to realign the parties, placing it in the position of plaintiff. *Id.* The Court granted this motion. *Id.*

Miller is not persuasive for several reasons. First, as Shorts argues, *Miller* has been subsequently criticized by several courts, including the court that issued the decision. In *Williamsburg Plantation*, the Court stated:

> *Miller* cannot stand for the affirmative proposition that a federal court should realign the parties to a state court action so as to make removal possible where the only federal question present is in the state court defendants' counterclaim.

478 F. Supp. 2d at 865. Indeed, in *Great Eastern Resort Corporation v. Bluegreen Corporation*, 2006 WL 3391504, *3 (W.D. Va. November 22, 2006), the court stated that "*Miller* provides no legal basis for a plaintiff/counterclaim-defendant to remove an action to federal court." In addition, the facts of *Miller* differ significantly from those in this case, because realignment was requested by the original defendant, Miller, not the original plaintiff or additional counterclaim defendant, and realignment was not being requested for the purpose of establishing removal authority.

Shorts, on the other hand, argues that courts routinely refuse to realign parties who were first joined as additional counterclaim defendants. For example, in *OPNAD Fund*, the Court applied the functional test and determined that McDonald' s, the additional counterclaim defendant, was properly aligned with the plaintiff, and therefore could not remove. 863 F. Supp. at 334. McDonald's developed OPNAD Fund, a not-for-profit corporation, to fund its national advertising efforts. *Id.* at 329. The original defendant, Joseph Watson, owned two McDonald's franchises. *Id.* When Watson notified OPNAD that he wanted to resign from participating with it, OPNAD sued him to collect delinquent contributions. *Id.* Watson counterclaimed against OPNAD and added McDonald's as an additional counterclaim defendant. *Id.* Watson's counterclaim asserted contract

and tort claims, and alleged that OPNAD and McDonald's conspired to drive him out of business. *Id.* at 329-30.

In applying the functional test, the Court found that OPNAD was affirmatively asserting claims for money due under contract, and Watson was resisting those claims through counterclaims. *Id.* at 334. It found that the "mainspring" of the action remained the collection of funds under contract. *Id.* Thus, the court concluded that McDonald's was not a "defendant" for purposes of removal, and should remain aligned with OPNAD as a plaintiff. *Id.*

Despite this precedent, ATTM argues that the underlying collection action is no longer the mainspring of this case, because, but for the counterclaims, the collection action would have concluded long ago. This argument is undermined, however, by several cases holding that, even in actions in which the original claim filed by the plaintiff is settled or dismissed, the original plaintiff remains the plaintiff for purposes of removing the remaining counterclaims. *Green Tree Financial Corp. v. Arndt*, 72 F. Supp. 2d 1278, 1282 (D. Kan. 1999); *Rodriguez v. Federal National Mortgage Association*, 268 F. Supp. 2d 87, 91 (D. Mass. 2003). In *Green Tree*, the district court stated that it was unaware of any case that had "employed realignment principles to conclude that a state court plaintiff can become a defendant, for purposes of § 1441(a), entitled to remove after the dismissal of its self-appointed claims." *Id.* at 1282. Thus, even accepting ATTM's argument that, in absence of the counterclaims, the underlying debt collection action would have already concluded, the Court finds no basis for realignment.

Because ATTM is properly joined as a counterclaim defendant, it is also properly aligned with Palisades, the original plaintiff. The "mainspring" of this action is Palisades' attempt to seek payment of a debt from Shorts. Shorts has defended herself against this claim by alleging that, under West Virginia law, she does not owe at least part of that debt. She asserts that Palisades and ATTM have jointly violated her state law rights by contracting for, and then trying to collect, the unlawful early termination fees which make up that debt. Although Palisades' role in the alleged state law violations is admittedly smaller than ATTM's role, both are accused of the same violations, and both are subject to the counterclaims. Realignment is not proper in this circumstance.

B. *REMOVAL UNDER CAFA*

ATTM asserts that CAFA provides independent removal jurisdiction, and therefore it may remove even though the Court has found that ATTM is not a "defendant" for purposes of removal under § 1441.

1. This claim meets CAFA's requirements.

As a starting point, ATTM asserts, and the Court agrees, that this claim meets the requirements for federal jurisdiction under CAFA. That statute requires the removing party to establish that (1) there are 100 or more class members, (2) the aggregate amount in controversy exceeds $5,000,000, and (3) minimal diversity exists. 28 U.S.C. §§ 1332(d)(5)(B), 1332(d)(6), 1332(d)(2)(A). Additionally, the action over which jurisdiction is sought must have commenced after CAFA's effective date of February 18, 2005. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 14 (2005).

This action commenced on January 11, 2006, well after CAFA's effective date. In her motion for class certification, Shorts alleges that there are "at least tens of thousands" of members of the putative class. ATTM corroborates this assertion by stating that, in the last three years of the putative class period alone, ATTM has had more than 160,000 individual subscribers with addresses in West Virginia who meet the qualifications for this class. Thus, the requirement that there be at least 100 members in the class is undisputedly met.

Similarly, both parties allege that the potential damages would well exceed the minimum CAFA requirement of $5,000,000. The claimants seek statutory damages of $100 to $1000 per class member. Having already established that the class contains at least 160,000 members, the claimed statutory damages could amount, at a minimum, to $16,000,000. In addition, the putative class members also challenge the enforceability of the Early Termination Fee component of their contracts, fees that were either $150 or $175 during the class period. Thus, this claim could amount to a minimum of $24,000,000. Recognizing that the actual class size and the amounts awarded may be larger than estimated here, and given that the claimants also seek fees and costs, the Court finds that the amount in controversy easily far exceeds $5,000,000.

The only possible question regarding jurisdiction under CAFA, therefore, arises over the question of minimal diversity. CAFA provides that district courts have original jurisdiction over civil class actions in which "any member of a class of plaintiffs is a citizen of a State different from any defendant."28 U.S.C. § 1332(d)(2)(A). This broad jurisdiction is lim-

ited, however; a district court "shall decline" jurisdiction over a class action in which (1) "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed," (2) at least one defendant from whom significant relief is sought, and whose alleged conduct forms a significant basis for the claims asserted, is a citizen of that same state, and (3) the principal injuries resulting from the alleged misconduct were incurred in that state. *Id.* at § 1332(d)(4).

Shorts is a citizen of West Virginia and the rest of the putative class members are either citizens of West Virginia or are citizens of other states who have resided in West Virginia. Neither of the companies comprising ATTM is a citizen of West Virginia, each being organized under the laws of the state of Delaware, with their principal place of business in the State of Georgia. Although Palisades does not join in the action for removal,[4] it is a named defendant in the class action, and thus must be considered in the analysis. Palisades is also incorporated in Delaware, and has its principal place of business in New Jersey.

The parties in this case clearly meet the minimal diversity contemplated by CAFA; Shorts and other class members are citizens of West Virginia while ATTM and Palisades are citizens of Delaware, New Jersey and Georgia. It appears, then, that this Court

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[4] CAFA "clearly suspends the well-established rule of unanimity for purposes of class action removals." *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329 (11th Cir. 2006) (citing 28 U.S.C. § 1453(b) "A class action ... may be removed by any defendant without the consent of all defendants.").

would have jurisdiction over this case, if it has been properly removed.

2. CAFA does not create an independent basis for removal.

Given these findings, the only remaining question regarding whether ATTM has properly removed this case is whether, as an alternative to finding that it is a "defendant" that can remove under § 1441, this Court can find that an independent basis for removal was created by CAFA. The relevant language in CAFA states:

> [a] class action may be removed to a district court of the United States in accordance with section 1446 . . . , without regard to whether *any defendant* is a citizen of the State in which the action is brought, except that such action may be removed by *any defendant* without the consent of all defendants.

28 U.S.C. § 1453(b) (2005) (emphasis added). ATTM argues that the use of the language "any defendant," rather than "the defendant," signals that Congress intended to broaden the understanding of which parties may remove a case to federal court. ATTM asserts that there is limited authority interpreting CAFA on this issue, and asks the Court to look at the congressional intent underlying CAFA and the public policies that CAFA was intended to promote.

ATTM notes, correctly, that little precedent exists on this question of statutory interpretation. Two recent cases are particularly instructive, however.[5]

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[5] ATTM asks this Court to interpret a case from the District of South Carolina as standing for the proposition that a newly joined third party would have a procedural right, under CAFA,

In an opinion from this district issued in June 2007, *CitiFinancial, Inc. v. Lightner*, Judge Stamp ruled that a counterclaim defendant seeking to remove a class action to federal court pursuant to CAFA was not a "defendant" and could not remove. 2007 WL 1655225 at *3. The plaintiff, CitiFinancial, Inc. ("CitiFinancial"), filed a claim in state court against the defendant, Lightner, for breach of contract. *Id.* at *1. Lightner responded by filing a counterclaim against Citifinancial, alleging violations of West Virginia consumer laws. *Id.* He then filed a second amended counterclaim alleging several putative class action counterclaims. *Id.* CitiFinancial then removed the action to the federal district court, alleging jurisdiction under CAFA. *Id.*

In considering a motion to remand filed by Lightner, Judge Stamp first cited *Shamrock Oil* for the proposition that 28 U.S.C. § 1446 makes clear that only "defendants" may remove an action to federal court. *Id.* at *2. He then found that CitiFinancial held the position of a plaintiff for the purposes of removal, and declined to realign the parties because "the counterclaim does not significantly alter CitiFi-

to remove a case to federal court. *Deutsche Bank Nat'l Trust Co. v. Tyner*, 233 F.R.D. 460 (D.S.C. 2006). In *Deutsche Bank*, the party attempting removal was joined as a "third-party defendant" against which class claims had been asserted. *Id.* at 461. The Court dismissed the class claims as improperly joined, and remanded the case to state court based on a lack of diversity jurisdiction. *Id* . at 463. The Court distinguished the language of § 1441 ("the defendant") from the language in § 1453 ("any defendant") and implied that a third-party defendant would be allowed to remove under § 1453. *Id.* at 464-65.This issue was not actually before that court, however, and thus its dicta is not controlling. Other courts actually deciding this question have not followed the reasoning in *Deutsche Bank*, and this Court relies on those cases instead.

nancial's status as a plaintiff." *Id.* at *3. In making this finding, Judge Stamp cited a case from the Northern District of Mississippi for the proposition that the "parties' status for purposes of removal is not affected by any affirmative defenses or counterpleadings." *Id.* (quoting *Estate of C.A. Spragins v. Citizens National Bank of Evansville*, 563 F. Supp. 424 (N.D. Miss. 1983) (internal quotations omitted). Ultimately, Judge Stamp held that CitiFinancial could not remove and remanded the case to state court. *Id.* at 3.

Although the *CitiFinancial* decision does not address whether CAFA in any way affects a third party's right to remove, it implies that the case law interpreting the definition of "defendant" under the statutes governing removal, 28 U.S.C. §§ 1441 and 1446, applies to removal under CAFA. Thus, if *Shamrock Oil* and its progeny apply when a plaintiff/counterclaim defendant seeks removal under CAFA, reason compels that such precedent should apply when an additional counterclaim defendant seeks removal.

Consistent with this reasoning, a federal district court in the Northern District of Ohio recently held that a defendant in the same position as ATTM could not use CAFA as a basis for removing a case to federal court. *See FordMotor Credit Co. v. Jones*, No. 1:07CV728, 2007 WL 2236618 (N.D. Ohio Jul. 31, 2007). *FordMotor* began as a collection action after the original defendant, Mr. Jones, leased a car from Mullinax, a car dealer in Ohio. *Id.* at *1. When Jones defaulted on his lease, Mullinax assigned the collec-

tion action to FordMotor Credit ("FordMotor").[6] *Id.* FordMotor then initiated a collection against Jones and his cosigner, Moore, and ultimately repossessed and resold the car. *Id.* Moore filed a counterclaim against FordMotor and a "cross-claim" against Mullinax, alleging violations of Ohio consumer protection law, and requested class certification. *Id.* Mullinax, termed a "cross-claim defendant" by the district court, removed the case to federal court. *Id.*

In removing the case, Mullinax conceded that it did not have authority to remove under 28 U.S.C. § 1441. *Id.* Instead, as ATTM has done here, it argued that CAFA provides an independent basis for removal. *Id.* Mullinax attempted to draw a distinction between the reference to "any defendant" in CAFA and the understanding of the meaning of "the defendant or the defendants" found in § 1441(a). *Id.* It then argued that, by using the phrase "any defendant," Congress intended for CAFA to apply to even third-party defendants. *Id.*

The district court declined the invitation to expand the definition of defendant to include an independent basis for removal under CAFA for a "cross-claim defendant." *Id.* at *3. Relying on Sixth Circuit precedent, it first noted that a third-party defendant does not have a right to remove a case under either § 1441(a) or § 1441(c). *Id.* (citing *First National Bank of Pulaski v. Curry*, 301 F.3d 456 (6th Cir. 2002)). It then concluded that nothing in CAFA alters this rule. *FordMotor*, 2007 WL 2236618 at *2.

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[6] Although the Northern District Court's opinion does not discuss this assignment, the assignment is described in FordMotor's Complaint, which Shorts provided for this Court's review.

Despite being labeled a "cross-claim defendant" by the Ohio district court, Mullinax clearly stood in the same position as ATTM in this case. Moreover, the district court's reasoning applies equally to an "additional counterclaim defendant." If CAFA did not alter the definition of "defendant" as it pertains to allowing removal, then the traditional rule continues to apply: an additional counter-claim defendant is not a defendant for purposes of removal. ATTM, therefore, may not rely on CAFA to circumvent the long-standing requirement that only a true defendant may remove a case to federal court.

III. CONCLUSION

Because ATTM is properly joined as a counterclaim defendant, and therefore has no authority to remove the case under 28 U.S.C. § 1441, and because CAFA does not create independent removal authority, the Court GRANTS Shorts' motion (dkt. no. 4) and REMANDS the case to the Circuit Court of Brooke County, West Virginia.

It is so ORDERED.

APPENDIX C

1. Section 2 of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, provides:

(a) **FINDINGS.**—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) **PURPOSES.**—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging and lowering consumer prices.

2. Section 1332 of Title 28, United States Code, provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States. For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.
>
> (c) For the purposes of this section and section 1441 of this title—
>
> (1) a corporation shall be deemed to be a citizen of any State by which it has been incor-

porated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall

within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which

the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district

court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that

arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

3. Section 1441 of Title 28, United States Code, provides:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been

brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability

determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

4. Section 1446 of Title 28, United States Code, provides:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the

receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

5. Section 1453 of Title 28, United States Code, provides:

(a) **Definitions.**—In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) **In general.**—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) **Review of remand orders.**—

(1) **In general.**—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) **Time period for judgment.**—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) **Extension of time period.** The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) **Denial of appeal.**—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) **Exception.**—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such

corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(4)

No. 08-1156

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC and
AT&T MOBILITY CORPORATION,

Petitioners,

v.

CHARLENE SHORTS and
PALISADES COLLECTIONS LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHARLENE SHORTS

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QUESTION PRESENTED

In the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (2005), Congress amended several jurisdictional rules concerning removal. CAFA did not expressly alter the longstanding rule of *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that counterclaim defendants cannot remove under 28 U.S.C. § 1441(a). When AT&T Mobility removed this action under § 1441(a) and CAFA, the district court remanded, applying *Shamrock Oil*. The question presented is:

Did CAFA silently supersede the *Shamrock Oil* rule and create removal jurisdiction for counterclaim defendants?

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Respondent Charlene Shorts opposes the petition filed by AT&T Mobility LLC and AT&T Mobility Corporation (jointly, ATTM) and respectfully submits this opposition brief.

JURISDICTION

The Court lacks jurisdiction over this appeal. CAFA explicitly incorporates 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," subject only to exceptions that are inapplicable here.[1] And the time allotted for appellate review under CAFA has expired. Furthermore, the well-pleaded complaint in this case fails to show any basis for federal jurisdiction.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case but omitted from those listed in the Petition: U.S. CONST. art. III, § 2; 28 U.S.C. § 1447(d); *id.* § 1453(c). These provisions are set forth in the Respondent Charlene Shorts's Appendix.

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1. *See* 28 U.S.C. § 1446(c)(1) ("Section 1447 shall apply to any removal of a case under this section . . . .").

2. The complaint in this action is for a state-law debt collection. ATTM's sole basis for federal jurisdiction is the counterclaim, which cannot supply federal jurisdiction on these facts. *See Vaden v. Discover Bank*, __ U.S. __, 129 S. Ct. 1262, 1277 n.17 (2009); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829-30 (2002).

STATEMENT OF THE CASE

ATTM's assignee, Palisades Collections LLC, filed this action in state court in West Virginia. Pet.'s App'x (P.A.) at 2a. Palisades' suit seeks to collect from Shorts on her contract and account with ATTM's predecessor, Cingular and/or AT&T Wireless. *Id.* Shorts answered the suit and asserted counterclaims against Palisades under West Virginia's consumer protection statute and common law. *Id.* at 3a. Shorts sought leave to join ATTM as an additional counterclaim defendant to her counterclaims, each of which concerns the charges on her ATTM contract and account. *Id.* at 3a-4a. The state court granted Shorts leave to join ATTM under West Virginia's counterparts to Rules 13(h) and 19 of the Federal Rules of Civil Procedure. ATTM conceded joinder in the state court proceeding. P.A. at 3a.

Shorts pleaded some of her counterclaims on behalf of herself and ATTM's similarly situated West Virginia customers, and she sought class certification under West Virginia's counterpart to Rule 23. P.A. at 4a. ATTM removed the action under CAFA and 28 U.S.C. § 1441(a). P.A. at 4a. Relying on this Court's decision in *Shamrock Oil*, the U.S. District Court for the Northern District of West Virginia concluded that ATTM is not a defendant who can remove under § 1441(a). P.A. at 4a-5a. The district court also rejected ATTM's argument that CAFA created a new removal procedure independent of § 1441 (P.A. at 5a), and it declined to exercise its discretion to realign ATTM as a defendant who can remove (*see* P.A. at 19a). The Fourth Circuit affirmed.

REASONS FOR DENYING THE PETITION

Following the "near-canonical rule" from *Shamrock Oil*, the Fourth Circuit held that counterclaim defendants such as ATTM cannot remove under § 1441(a) or CAFA. For 68 years, Congress has legislated against the backdrop of *Shamrock Oil* and its progeny, demonstrating its ability to expressly create counterclaim-based removal jurisdiction when it intended to do so.[3] The lower courts have followed *Shamrock Oil* uniformly, not once denying a remand motion following removal by a counterclaim defendant. The Fourth Circuit simply followed suit. Thus, ATTM's petition offers no opportunity for the Court to resolve a split of authority, and it raises no important issue of federal law that has not been previously resolved by the Court. None of the Court's Rule 10 factors are in play.

More importantly, and completely unaddressed by ATTM and its amicus, the Court is without jurisdiction over this appeal.

A. The Court Lacks Jurisdiction Under § 1447(d) To Review The District Court's Remand Order.

ATTM relied on the limited exception to 28 U.S.C. § 1447(d)'s restrictions on appeals of remand orders to obtain review in the court of appeals. The strict time

3. *See, e.g.*, 28 U.S.C. § 1452 ("A party may remove any claim or cause of action [related to bankruptcy cases]."); 19 U.S.C. § 337(c) ("Immediately after a counterclaim is received by the [International Trade] Commission, the respondent raising such counterclaim shall file a notice of removal with a United States district court . . . .").

limits for that review have now passed, however, and ATTM provides no justification for ignoring those limits now. Congress made it clear that appellate jurisdiction over remand orders would be narrowly circumscribed both in § 1447(d) and again in the CAFA by making its removal provisions explicitly subject to § 1447.

Article III, section 2, of the Constitution gives Congress the authority to limit the Court's appellate jurisdiction in any non-original action: "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." U.S. CONST. art. III, § 2. Congress exercised its authority in creating the jurisdictional bar in § 1447(d), which provides in relevant part that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Although CAFA modifies § 1447(d), it lifts the jurisdictional bar only for an abbreviated review by the courts of appeals—not this Court:

> Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed [subject to strict time limits].

28 U.S.C. § 1453(c).

In this Court, § 1447(d) is a complete bar to appellate jurisdiction. *See Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947).[4] Nothing in the exception created by § 1453(c) can be construed to reach these proceedings as the exception allowing for review in the court of appeals expires after sixty days. *See* 28 U.S.C. § 1453(c)(2). And Congress could hardly have been more explicit in exercising its Article III authority: a remand order "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d).[5] It is of course a first

4. *See also Kloeb v. Armour & Co.*, 311 U.S. 199, 204 (1940).

5. None of the recognized exceptions to § 1447(d) apply. Because ATTM attempted to effect removal as a counterclaim defendant, the removal was defective under § 1447(c), and the district court lacked subject matter jurisdiction. There is no applicable statutory exception, the remand order was issued for reasons contemplated by § 1447(c), and there was no ruling on the merits. In this circumstance, a remand order is not reviewable on appeal or otherwise:

> The parties do not dispute that the District Court's order remanded this case to the Ohio state court from which it came. There is also no dispute that the District Court remanded this case on grounds of untimely removal, precisely the type of removal defect contemplated by § 1447(c). Section 1447(d) thus compels the conclusion that the District Court's order is "not reviewable on appeal or otherwise."

Things Remembered v. Petrarca, 516 U.S. 124, 128 (1995); *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) ("The District Court's remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise."); *see also Things Remembered*, 516 U.S. at 128 ("Absent a clear statutory command to the contrary, we assume that Congress is 'aware of the universality of the practice' of denying appellate review of remand orders when Congress creates a new ground for removal." (quoting *United States v. Rice*, 327 U.S. 742, 752 (1946))).

principle that this Court exercises appellate jurisdiction when reviewing the decisions of lower courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147-48 (1803).

Neither is it surprising that Congress declined to provide, in CAFA, for an appeal to the Supreme Court. ATTM's August 2007 Notice of Removal is nearly two years old already. Further review would be contrary to the notions of respect and comity that have traditionally informed both Congress and the courts in this arena.

In *United States v. Rice*, the Court attributed these notions in § 1447(d) to congressional policy: "Congress, by the adoption of [the predecessor to § 1447(d)], established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." 327 U.S. 742, 751 (1946).[6] In enacting CAFA, Congress preserved this policy, albeit with exception, tailoring a minimalist,

6. Both federalism and judicial economy inform this policy:

> Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed, and the state court proceedings are to be interfered with once, at most. This is not only in the interest of judicial economy, but out of respect for the state court and in recognition of principles of comity. The action must not ricochet back and forth depending upon the most recent determination of a federal court.

In re La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969); *cf. State of Ohio v. Wright*, 992 F.2d 616, 619 (6th Cir. 1993) ("The result of the removal has been to delay the administration of justice in the case in the state courts for more than five years.").

truncated review period in the courts of appeals only. That exception has run its course, and ATTM is no longer permitted to interrupt the state-court proceedings below.

Remarkably, neither ATTM's petition nor the amicus brief of the Chamber of Commerce makes any reference to § 1447(d). Shorts submits that their silence speaks volumes.

Likewise, the well-pleaded complaint of the Plaintiff below, Palisades, plainly shows no basis for federal jurisdiction. Federal courts look to the well-pleaded complaint, not counterclaims or third-party pleadings to determine whether an action is removable. *See Vaden v. Discover Bank*, __ U.S. __, 129 S. Ct. 1262, 1277 n.17 (2009); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829-30 (2002).

B. There Are No Compelling Reasons Or Exceptional Circumstances That Justify Review.

1. No Conflict of Authorities Exists.

ATTM's petition meets none of the reasons for review in this Court's Rule 10. ATTM concedes there is no circuit split to resolve. Pet. at 10. It identifies no conflicting authority from a state court of last resort or this Court. It cannot argue a departure from the usual course of judicial proceedings because, since *Shamrock Oil*, counterclaim defendants have never been allowed to remove under § 1441(a).[7]

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7. Also, ATTM cites no case, and Shorts can find none, that purports to allow removal pursuant to CAFA independent of § 1441(a).

Indeed, for as long as the general removal statute has authorized the "defendant or defendants" to remove, federal courts have consistently restricted that authority to original defendants.[8] ATTM points to no exception to the rule. Instead, it asks the Court to grant its petition to consider whether, for nearly 70 years, the central holding of *Shamrock Oil* has been misconstrued.

A long line of cases uniformly follows *Shamrock Oil*, holding each and every time that counterclaim defendants, *including additional counterclaim defendants*, cannot remove.[9] ATTM and its amicus

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8. The rule denying removal to counterclaim defendants is as old as our Republic. In the Judiciary Act of 1789, Congress granted a right of removal to "the defendant." Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1845). In *West v. Aurora City*, the Supreme Court interpreted these words to mean that a plaintiff could not remove the case when a counterclaim falling within federal jurisdiction was asserted against it. 73 U.S. 139, 142 (1867). For a brief period between 1875 and 1887, Congress repealed this rule, granting the right of removal to "either party." Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 471 (1875). In 1887, however, Congress enacted the predecessor to the present § 1441(a), reverting to a removal authority only for "the defendant or defendants." Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (1887). From there, the language migrated, with the slight change to "the defendant or the defendants," into § 1441(a). *Shamrock Oil* addressed the immediate predecessor to § 1441(a).

9. *See, e.g.*, *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007) (class action); *CitiFinancial, Inc. v. Lightner*, No. 5:06-cv-00145, 2007 WL 3088087, at *4-5 (N.D. W. Va. Oct. 22, 2007) (same); *Ford Motor Credit Co. v. Jones*, No. 1:07-cv-728, 2007 WL 2236618, at *8-10 (N.D. Ohio July 31, 2007) (same);

(Cont'd)

suggest that the decision below conflicts with authority that has allowed removal by counterclaim defendants—namely the Fifth Circuit's *State of Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), and a total of two district court decisions, *Mace Securities International, Inc. v. Odierna*, No. 08-cv-60778, 2008 WL 3851839 (S.D. Fla. Aug. 14, 2008), and *H&R Block, Ltd. v. Housden*, 24 F. Supp. 2d 703 (E.D. Tex. 1998). *See, e.g.*, Pet. at 26 n.12. But they fail to inform the Court that all three cases address removal *not* under § 1441(a) but under § 1441(c). This distinction renders these cases inapposite, because § 1441(c) explicitly provides for

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Unifund CCR Partners v. Wallis, No. 06-cv-545, 2006 WL 908755, at *3 (D.S.C. Apr. 7, 2006) (same); *Williamsburg Plantation, Inc. v. Bluegreen Corp.*, 478 F. Supp. 2d 861, 862 (E.D. Va. 2006) (same); *Great E. Resort Corp. v. Bluegreen Corp.*, No. 5:06-cv-00084, 2006 WL 3391504, at *3 (W.D. Va. Nov. 22, 2006) (same); *Dartmouth Plan, Inc. v. Delgado*, 736 F. Supp. 1489, 1492 (N.D. Ill. 1990) (same pre-CAFA); *Capitalsource Fin., LLC v. THI of Columbus, Inc.*, 411 F. Supp. 2d 897, 900 (S.D. Ohio 2005) (non-class case); *Rodriguez v. Fed. Nat'l Mortgage Ass'n*, 268 F. Supp. 2d 87, 90 (D. Mass. 2003) (same); *Green Tree Fin. Corp. v. Arndt*, 72 F. Supp. 2d 1278, 1282 (D. Kan. 1999) (same); *Starr v. Prairie Harbor Dev. Co.*, 900 F. Supp. 230, 232-233 (E.D. Wis. 1995) (same); *OPNAD Fund, Inc. v. Watson*, 863 F. Supp. 328, 334 (S.D. Miss. 1994) (same); *Tindle v. Ledbetter*, 627 F. Supp. 406, 407 (M.D. La. 1986) (same); *see also Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005) (as support for an argument on a different CAFA issue, citing *Shamrock Oil* for the proposition that § 1441 "is quite clear that only a 'defendant' may remove the action to federal court"); *FIA Card Servs., N.A. v. Gachiengu*, No. 07-cv-2382, 2008 WL 336300, at *6 n.4 (S.D. Tex. Feb. 5, 2008) (agreeing in *dicta* that a counterclaim class-action defendant cannot remove).

removal of later-joined, separate and distinct claims *only when the claims are based on federal-question jurisdiction*. Section 1441(a), by contrast, does not. Shorts's counterclaim is based on state law and raises no federal question, which puts § 1441(c), and ATTM's cases, entirely out of the picture.

Even setting aside the critical § 1441(a)/§ 1441(c) distinction, the authority cited by ATTM would provide no basis for review in light of the Court's pronouncement in *Holmes Group* that "a counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for 'arising under' jurisdiction." 535 U.S. at 829-30. The recent decision in *Vaden* is even more explicit—and relevant:

> [A] party's ability to gain adjudication of a federal question in federal court often depends on how that question happens to have been presented . . . . When a litigant files a state-law claim in state court, and her opponent parries with a federal counterclaim, the action is not removable to federal court, even though it would have been removable had the order of filings been reversed. . . . [H]ypothesizing about the case that might have been brought does not provide a basis for federal-court jurisdiction.

129 S. Ct. 1262, 1277 n.17 (2009).[10]

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10. Because § 1441(c) does not apply, it is unnecessary to explore the constitutional difficulties with which § 1441(c) is fraught. *See Porter v. Roose*, 259 F. Supp. 2d 638 (S.D. Ohio 2003).

If *Holmes Group*, 535 U.S. at 832, was not clear enough in refusing "to transform the longstanding well-pleaded-complaint rule into the 'well-pleaded-complaint-or-counterclaim rule,'" then *Vaden*, 129 S. Ct. at 1278, resolves all doubt in pronouncing that "federal jurisdiction cannot be invoked on the basis of a defense or counterclaim." Where federal-question counterclaims in *Holmes Group* and *Vaden* were insufficient to invoke federal jurisdiction, Shorts's state-law counterclaim can do no better.

In the face of uniformly contrary authority, ATTM nonetheless argues that *Shamrock Oil* should be, in effect, limited to its facts. Thus, ATTM suggests that the case, at most, stands for the principle that a plaintiff may not remove. Not so. *Shamrock Oil* did more than reject removal by a "plaintiff"; it categorically excluded counterclaim defendants from those "defendants" who are authorized to remove under the general removal statute. In fact, in its conclusion, the *Shamrock Oil* Court disclaimed any reliance on the rationale that the plaintiff/counterclaim defendant had waived the right to remove by initiating the suit: "one does not acquire an asserted right by not waiving it, and the question here is not of waiver but of the acquisition of a right which can only be conferred by Act of Congress." 313 U.S. at 108.

2. ATTM Overstates The Issue's Importance And The Likelihood That It Will Recur Frequently.

The only other rationale ATTM can muster in favor of granting review in the absence of a genuine conflict is its opinion that the issue is of "national importance" and likely to be recurring frequently.[11] But even there, the only support ATTM offers is a law review article that, although it suggests the issue is likely to be repeated, goes on to meticulously detail why CAFA cannot be construed to allow counterclaim-defendant removal, at least not without running afoul of the Constitution and numerous canons of statutory construction.[12] ATTM's reliance on academic interest in the issue is telling, as it sometimes happens that academic articles on an issue vastly outnumber the actual, substantive cases under discussion and

11. Notably, the case is in no sense "national" as the proposed class is entirely made up of West Virginians.

12. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193, 196 (2007) ("CAFA might have shifted the tide of class action practice toward the federal shore, but it has left some wading room for state courts to contribute to the development of the law of class actions."); *id.* at 215-16 ("[T]he conclusion that section 1441 does not authorize the removal of counterclaim class actions results from an uncomplicated, almost mundane, exercise in legal reasoning. The combination of a clear text ('the defendant or the defendants'), an on-point Supreme Court decision (*Shamrock Oil*), a bedrock jurisdictional canon (the rule that the court's jurisdiction must appear on the face of the complaint), and a sensible interpretive policy (strict construction in order to allow state courts the greatest authority to decide cases brought under state law) is too much to overcome.").

exaggerate the importance of the few there are.[13] In fact, as to both recurrence and importance, ATTM's claim that the issue is significant and will recur frequently is belied by the dearth of actual cases on point. In the four years since CAFA was enacted, only *six* counterclaim class actions have been removed to the federal courts—and none successfully.[14]

The reality is that joinder rules limit the use of class action counterclaims. Those rules do not allow unrelated counterclaims or unrelated counter-defendants to be joined willy-nilly. Even if some state court were to allow it, the doctrines of fraudulent joinder and realignment empower district courts to adequately manage the situation.[15] Only in the narrow situation presented here, where the counterclaims and additional counterclaim defendants are closely intertwined with the issues raised in the complaint itself, will a counterclaim be joined to the original civil action. The term "class action additional counterclaim defendant" sounds rare and exotic because it is.

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13. *See generally* Christopher Regan, *A Whole Lot of Nothing Going On*, 75 NOTRE DAME L. REV. 797, 797-99 n.4 (2000).

14. *See* note 9, *supra*.

15. In this case, ATTM conceded joinder but, after removal, tried to realign. PA. at 43a, 48a. The district court found that ATTM was not misaligned on the facts before it. P.A. at 52a. The mainspring of the action was the attempt by Plaintiff, Palisades, to seek damages from Shorts. P.A. at 51a-52a. Far from uninvolved, ATTM (through its predecessor in interest) is a necessary part of these claims. P.A. at 52a. Each of Shorts's counterclaims involves charges on her ATTM contract and account. *Id.* (noting that "both [ATTM and Palisades] are accused of the same violations"). The joinder and realignment rules work, as they did in this case.

C. The Text and Legislative History Of CAFA Supports The Decision Below.

Undeterred by its inability to wrest a conflict from the case law, ATTM urges the Court to grant review to consider whether there is a conflict between the decision below and CAFA's text or legislative history. Unabashedly, it represents in its Question Presented that CAFA says qualifying class actions "may be removed to a district court of the United States * * * by any defendant." Pet. at i. Yet CAFA no more says this than the First Amendment says "Congress shall make no law." In both instances, the omitted portion of the sentence is essential.

The Fourth Circuit recited and applied CAFA correctly. It noted express changes in § 1453—the provision ATTM creatively excerpts—to the rule in *Chicago, Rock Island & Pacific Railway Co. v. Martin*, 178 U.S. 245, 248 (1900), that all defendants must unanimously consent to removal, the complete-diversity rule of *Strawbridge v. Curtiss*, 7 U.S. 267, 267-68 (1806), and the one-year deadline for removal under 28 U.S.C. § 1446(b). But as to the rule from *Shamrock Oil*, the Fourth Circuit acknowledged that § 1453 is silent.

In ATTM's view, this silence must be construed as repealing *Shamrock Oil*. The Fourth Circuit rightly discredited that notion:

> [W]e . . . recognize that it is our duty, as a court of law, to interpret the statute as it was written, not to rewrite it as ATTM believes Congress could have intended to write it. If

> Congress intended to make the sweeping change in removal practice that ATTM suggests by altering the near-canonical rule that only a "defendant" may remove and that "defendant" in the context of removal means only the original defendant, it should have plainly indicated that intent.

P.A. at 18a-19a.[16] To hold otherwise would violate the principle of construction explained in *Whitman v. American Trucking Associations*: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." 531 U.S. 457, 468 (2001).

Last, ATTM argues that CAFA's legislative history—a questionable Senate Report[17]—evinces an

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16. *See also Shamrock Oil*, 313 U.S. at 108 (constitutional limits on federal power require the Court to strictly construe the jurisdiction-conferring statute in favor of remand); *id.* at 106 (the Court must assume that Congress knew the legal backdrop against which it was legislating); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (where Congress has amended a body of law, those parts that remain unchanged are presumed to have been left alone on purpose).

17. AT&T's reliance on the Senate Report is undermined significantly by the report's silence on counterclaims and *Shamrock Oil*. The Senate Report is also of dubious integrity, as it was signed by only 13 senators and was issued 10 days *after* CAFA's enactment. *See Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006). To the extent that legislative history serves as legitimate evidence of congressional intent, it does so only

(Cont'd)

intent to expand federal jurisdiction to reach this case. It is anemic, at best, to argue that CAFA's policy can accomplish implicitly what Congress did not do expressly. Every circuit court to address this argument has rejected it.[18] But even if gleaned congressional intent or policy were

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(Cont'd)
because it is presumed to have been ratified by Congress and the President when the relevant legislation was enacted. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1522 (2000); *see also Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring). That did not occur with respect to the Senate Report on CAFA, which, as noted, was signed by a handful of senators and released after the President signed the legislation into law.

18. *See, e.g.*, *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 296 (4th Cir. 2008) (refusing, in the absence of explicit language, to construe CAFA as altering the "near-canonical rule" placing the burden of proving federal jurisdiction on the removing party); *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007) (noting that, even after CAFA, "federal courts are courts of limited jurisdiction which we will strictly construe"); *Galeno*, 472 F.3d at 58 (rejecting the notion that CAFA's policy obliterates Congress's refined alterations in the field of removal jurisprudence); *Morgan v. Gay*, 471 F.3d 469, 472-73 (3d Cir. 2006) (holding that CAFA's general policy is not "an indication that Congress intended to shift long- and well-established" law); *Saab v. Home Depot U.S.A., Inc.*, 469 F.3d 758, 759-760 (8th Cir. 2006) (declining to read CAFA's appeal provision broadly to permit appeal of remand order otherwise not facially authorized); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329-30 (11th Cir. 2006) (holding that appeals "to CAFA's 'overriding purpose' are unavailing in the face of CAFA's silence on the traditional, well-established rules that govern the placement of the burden of proof and the resolution of doubts
(Cont'd)

a sufficient basis for both rejecting strict construction of jurisdiction-conferring statutes and presuming that Congress was ignorant of the legal backdrop against which it legislated, even then, there is no basis for inferring that Congress intended that all or even most class actions should end up in federal court. CAFA certainly does not require that any class action be filed in or removed to federal court. It creates *concurrent* jurisdiction with state courts; it neither preempts state-court jurisdiction nor exhibits any such intent. In fact, in many circumstances, CAFA will require district courts to remand class actions despite the presence of minimal diversity.[19] It is therefore difficult, to say the least, to infer that Congress intended any particular case to be litigated in federal court.[20]

(Cont'd)
in favor of remand"); *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (applying a rule of strict construction to CAFA); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (holding that, to change the presumption in favor of remand, "Congress must enact a statute with the President's signature (or by a two-thirds majority to override a veto)"); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 n.7 (10th Cir. 2005) (noting congressional intent to expand jurisdiction but stating that "general sentiments do not provide *carte blanche* for federal jurisdiction over a state class action").

19. *See* 28 U.S.C. § 1332(d)(4) (requiring remand where at least one primary defendant and two-thirds of the class are citizens of the forum state, regardless of the amount in controversy).

20. Indeed, CAFA's legislative history suggests that most class actions will remain in state court:

> During Committee debate on previous versions of this bill [CAFA], the most frequently expressed concern was that its jurisdictional provisions would

(Cont'd)

ATTM's position is also difficult to square with much of the Senate Report on which it relies. That Senate Report plainly contemplates that CAFA removal is pursuant to the general removal provisions of § 1441(a) rather than § 1453.[21] As previously explained, this means incorporation—not rejection—of the rule from *Shamrock Oil*. Finally, a prior draft of CAFA, which was considered *and rejected* by Congress, purported to allow removal by additional parties—class-member plaintiffs.[22] Having decided against altering this removal rule expressly, Congress should not be presumed to have altered it silently.

(Cont'd)

> overload the federal judiciary. That argument, however, ignores three key facts. First, the bill will not move most class actions to federal court. . . . [A] recent study debunked the myth promoted by some of the bill's critics that S. 5 will move nearly all class actions to federal court.

S. REP. No. 109-14, at 51-52 (2005).

21. *See id.* at 48 (citing and quoting § 1441(a) for the proposition that, "like other removed actions, matters removable under this bill may be removed only 'to the district court of the United States for the district and division embracing the place where such action is pending'"); *id.* at 49 (citing § 1441(a) for the proposition that "[t]he Act does not, however, disturb the general rule that a case can only be removed to the district court of the United States for the district and division embracing the place where the action is pending").

22. *See* S. 1751, 108th Cong., § 5(a) (Oct. 17, 2003) (early draft of CAFA allowing removal by class-member plaintiffs, which was considered and rejected by Congress).

In short, the Fourth Circuit correctly held that neither CAFA's text nor its legislative history undercut *Shamrock Oil*'s rule that counterclaim defendants cannot remove. If ATTM wishes to change the rule, it should appeal to Congress.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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APPENDIX

APPENDIX A — UNITED STATES CONSTITUTION ARTICLE III, § 2

United States Constitution Article III, § 2

> Clause 1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> Clause 2: In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Appendix A

Clause 3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX B — 28 U.S.C. § 1447(d)

28 U.S.C. § 1447(d)

28 U.S.C. § 1447. Procedure after removal generally

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

APPENDIX C — 28 U.S.C. § 1453(c)

28 U.S.C. § 1453(c)

28 U.S.C. § 1453. Removal of class actions

(c) Review of remand orders.

(1) In general. Section 1447 [28 USCS § 1447] shall apply to any removal of a case under this section, except that notwithstanding section 1447(d) [28 USCS § 1447(d)], a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) Time period for judgment. If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

Appendix C

(3) Extension of time period. The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(3)

No. 08-1156

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC AND
AT&T MOBILITY CORPORATION,
Petitioners,

v.

CHARLENE SHORTS AND
PALISADES COLLECTIONS LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT PALISADES COLLECTIONS LLC IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The respondent Palisades Collections LLC ("Palisades") adopts Petitioners' recitation of the question presented.

RULE 29.6 STATEMENT

Respondent Palisades Collections LLC, a Delaware Limited Liability Company, is a wholly owned subsidiary of a privately held company, Asta Funding, Inc.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT PALISADES COLLECTIONS LLC IN SUPPORT OF PETITIONERS

Respondent Palisades Collections, LLC ("Palisades") respectfully submits this brief in support of the Petition for a Writ of Certiorari.

INTRODUCTION AND SUMMARY

In the summer of 2006, Palisades filed a collection action against the respondent, Charlene Shorts ("Shorts") in the Magistrate Court of Brooke County,

West Virginia, in order to recover $794.87 for an early termination fee and other charges relating to Shorts' cellular telephone service with AT&T Wireless Services, Inc. Shorts filed an Answer denying the allegations of the Complaint. She also asserted a Counterclaim against Palisades claiming violations of the West Virginia Consumer Credit and Protection Act, §§46A-6-04 *et seq.* (LexisNexis 2006). Nearly a year later, Shorts filed a First Amended Counterclaim joining AT&T Mobility ("ATTM") as an additional counterclaim defendant.

Thereafter, ATTM timely removed the case to the United States District Court for the Northern District of West Virginia. Shorts filed a Motion to Remand arguing that ATTM had no right to remove under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4. Essentially, Shorts argued that ATTM could not remove the case to federal court because it was not a "defendant" under the General Removal Statute, 28 U.S.C.A. §1441. The district court granted Shorts' Motion and remanded the case to state court, ruling that ATTM could not remove the case to federal court because (a) ATTM was ". . . not a 'defendant' for purposes of removal under §1441," and (b) CAFA does not create any independent removal authority that would allow ATTM to " . . . circumvent the long-standing requirement that only a true defendant may remove a case to federal court." Pet. App. 38a-59a.

In short, Shorts morphed a small claims court debt collection action into a proposed class action potentially encompassing more than 160,000 class members and putting at least $16 million in controversy, *id.* 20a-21a, and the district court refused jurisdiction.

A sharply divided panel of the Court of Appeals for the Fourth Circuit affirmed the remand and held that removal was improper because ATTM was a counterclaim defendant and not a defendant.

Strongly in dissent, Judge Niemeyer explained that the majority's holding was against the very purpose and text of CAFA, which allows "any" defendant to seek removal. *Id.* 23a (citing 28 U.S.C.A. §1453(b)). Judge Niemeyer also dissented from the denial of a rehearing *en banc*, declining to request a poll of the Court because he "prefer[red] to release this case to the early consideration of the Supreme Court." *Id.* 36a-37a

Palisades agreed to the removal to federal court. Palisades now finds itself transformed from a collection agency attempting to recover less than $800 in small claims court to a defendant in a massive class action, and therefore had and has no objection to continuing in federal court, where CAFA seems to say it belongs.

SUMMARY OF ARGUMENT

Palisades agrees with and adopts the reasons cited in the Petition for a Writ of Certiorari filed by ATTM and the *amicus* brief filed by the Chamber of Commerce of the United States ("Chamber of Commerce").

Palisades also asserts that this Court should grant the Petition and review the ruling below for the following additional or supplemental reasons:

1. The opinion of the majority below relies on an incorrect construction of CAFA and an improper reading of CAFA alongside the General Removal Statute.

2. The ruling below circumvents the clear intent of Congress when it passed CAFA.
3. The ruling below is inconsistent with rulings of other courts of appeals, and this Court should resolve the inconsistencies.
4. This Court should avail itself of the opportunity to explain the scope of its 1941 decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

ARGUMENT

Palisades agrees with and adopts each of the arguments set forth in the Petition for Writ of Certiorari filed by ATTM regarding the proper construction of CAFA and the suitability of this case to resolve the disparate rulings of the Courts of Appeals across this country. 28 U.S.C. §1441(a) sets forth the general rule for removal authority, that civil actions "...of which the district courts of the United States have original jurisdiction, may be removed by *the* defendant or *the* defendants." (Emphasis added). This language is important to an understanding of both the rule that *all* defendants must unanimously consent to removal, *see Chicago Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 247 (1900), and the rule that only *original* defendants can remove, *see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-108 (1941).

However, 28 U.S.C. §1453(b), which was added by CAFA, sets forth a clearly different rule for removal of class actions over which the district courts have removal jurisdiction.

Specifically, §1453(b) provides as follows:

> A class action may be removed to a district court of the United States in accordance with section 1446(except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

In *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005), this Court shed light on the proper construction of jurisdictional statutes. Courts are directed to follow the statute's plain meaning. As Justice Kennedy explained, jurisdictional statutes should not be given "a more expansive interpretation than their text warrants," nor should they be given "an artificial construction that is narrower than what the text provides." *Id.*, 545 U.S. 558. This Court should analyze the jurisdictional provisions in 28 U.S.C. §§1441 and 1453(b) against this backdrop.

§1453(b) states unequivocally that "a class action *may be removed* . . . " 28 U.S.C. §1453(b) (Emphasis added). This unambiguous language is similar to language in other federal statutes that courts have found to confer independent jurisdictional grounds. For example, 28 U.S.C. §1442, the "federal officer removal" statute, similarly provides "a civil action or criminal prosecution commenced in State Court against [the United States, its agencies, or its officers] *may be removed*." 28 U.S.C. §1442; *IMFC Prof'l Servs. of Fla., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 156(5th Cir.1982) (stating that "1442 itself grants independent jurisdictional grounds over cases involving federal officers where a district court otherwise would not have jurisdiction"). *See also* 28

U.S.C. §1443, which provides that certain state court actions where the defendant relies on Federal Civil Rights law for its defense "*may be removed*". The plain language of these provisions, particularly Congress' choice of the passive voice, authorizes removal of these actions regardless of the label placed on the removing defendant.

Second, as the *amicus* brief filed by the Chamber of Commerce suggests, the decision of the Fourth Circuit vitiates the clear intent of the legislative branch when CAFA was passed. Left undisturbed, the opinion of the majority below, coupled with the "counterclaim class action" strategy described in the Petition, will circumvent CAFA's thrust and return America to the "bad old days" of class action abuse.

Third, as is reflected in the *amicus* brief of the Chamber of Commerce, the decision of the majority below is inconsistent with the holdings of other courts of appeals that each of the defendants in a class action should be viewed separately. In other words, other courts of appeals have ruled that the actions of one defendant in multi-defendant class actions should have no bearing on the ability of another defendant to remove under CAFA. As the statute says, "*any defendant*" may remove.

Fourth and last, this Court should grant the Petition and review this case because it gives the Court a great opportunity to explain the scope of *Shamrock Oil*, 313 U.S. 100, which has, since 1941, been susceptible to different and inconsistent interpretations by the lower courts of this country, as to whether the *Shamrock Oil* rule applies to counterclaim defendants, such as Petitioners, who were not parties in the original action.

Palisades argues, as did the Chamber of Commerce in its *amicus* brief, that *Shamrock Oil* does not extend to CAFA removals. But even if it did, review by this Court would be proper and advisable because the Circuits are split on the applicability of the *Shamrock Oil* rule where, as in this case, the counterclaim defendant was not a party to the original action, and timely removed after it was brought in as a counterclaim defendant. *Any* defendant does not have to mean *any original* defendant.

CONCLUSION

For the foregoing reasons, and for the reasons cited by Petitioners and by the *amicus curiae*, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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May 22, 2009

No. 08-1156

In the Supreme Court of the United States

AT&T MOBILITY LLC AND
AT&T MOBILITY CORPORATION,

Petitioners,

v.

CHARLENE SHORTS AND
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

In his dissent from the denial of rehearing en banc, Judge Niemeyer invited this Court to grant certiorari. He explained that the case involves "an important issue of statutory interpretation" and that "the majority's interpretation creates an unfortunate loophole in [CAFA] that only the Supreme Court can now rectify." Pet. App. 37a.

The need for review is confirmed by the amicus brief filed by the Chamber of Commerce, which both represents businesses that are defendants in interstate class actions and played a significant role in CAFA's enactment. Br. 1-2. On the basis of this experience, the Chamber predicts that the decision below will result in "widespread circumvention" of the Act, "largely undoing the changes instituted by CAFA" and "substantially compromising the statute's effectiveness," and that the decision will therefore have "an immediate, substantial impact on class action litigation in the United States." Br. 4-5.

The need for review is also confirmed by Shorts' brief in opposition, which offers no persuasive reason why the Court should decline Judge Niemeyer's invitation.

A. This Court Has Jurisdiction

Shorts contends that this Court lacks jurisdiction to review the decision below. She argues that (1) "[28 U.S.C.] § 1447(d) is a complete bar to appellate jurisdiction" and (2) "the well-pleaded complaint * * * shows no basis for federal jurisdiction." Opp. 5, 7. Neither Section 1447(d) nor the "well-pleaded complaint" rule applies here.

1. Section 1447 is titled "Procedure after removal generally." Subsection (d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Section 1453 is titled "Removal of class actions." Subsection (c)(1) provides that, "*notwithstanding section 1447(d)*, a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed" (emphasis added).

As it correctly concluded, the court of appeals "possess[ed] jurisdiction to review the district court's remand order under 28 U.S.C.[] § 1453(c)(1)." Pet. App. 5a. It follows that this Court has jurisdiction to review the court of appeals' decision under 28 U.S.C. § 1254(1), which provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court" by writ of certiorari.

Shorts asserts that "Congress declined to provide, in CAFA, for an appeal to the Supreme Court." Opp. 6. But Congress did not have to provide for review by this Court in CAFA. Such review is already authorized by Section 1254(1) for any case "in" the court of appeals, and an appeal under Section 1453(c)(1) is assuredly such a case. If Congress had wished to limit this Court's jurisdiction, it would have done so explicitly, as it has done elsewhere. See, *e.g.*, 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application [for a writ of habeas corpus] * * * shall not be the subject of a petition * * * for a writ of certiorari."). There is no such limitation in CAFA.

Shorts also asserts that CAFA's "strict time limits for [appellate] review have now passed." Opp. 3-4. But the 60-day deadline for a decision applies to "the court of appeals." 28 U.S.C. § 1453(c)(2). The only timing requirement applicable in *this* Court is that the petitioner file its petition for certiorari within 90 days from the date on which the court of appeals denied rehearing. Sup. Ct. R. 13. ATTM has done so.

Shorts purports to find it "[r]emarkabl[e]" that the petition "makes [no] reference to § 1447(d)." Opp. 7. But because Section 1447(d) has no applicability to a class action like this one, and because this case was properly in the court of appeals under Section 1453(c)(1), the only "remarkable" omission is *Shorts'* failure to explain why this Court lacks jurisdiction under Section 1254(1)—a provision, tellingly, that she does not even cite. Shorts also fails to explain why Congress would have divested of jurisdiction the only Court capable of ensuring uniform application of a statute that regulates interstate class actions.

2. Shorts' second jurisdictional argument is that, under the "well-pleaded complaint" rule, a case cannot be removed unless the district court's jurisdiction is established on the face of the complaint and that Palisades' state-court complaint does not establish federal jurisdiction. Opp. 1 & n.2, 7, 11. That argument is equally baseless.

This case involves diversity jurisdiction, under 28 U.S.C. § 1332. The well-pleaded complaint rule applies only in cases involving federal-question jurisdiction, under 28 U.S.C. § 1331. This Court explicitly so held in *American National Red Cross* v. *S. G.*, 505 U.S. 247 (1992), a case that Shorts does

not cite. There the Court made "short work" of the argument that a "conferral of federal jurisdiction" other than one based on a federal question is "subject to the requirements of the 'well-pleaded complaint' rule * * * limiting the removal of cases from state to federal court." *Id.* at 258. The Court explained that the plaintiffs had "erroneously invoke[d]" the rule "outside the realm of statutory 'arising under' jurisdiction, *i.e.*, jurisdiction based on 28 U.S.C. § 1331." *Ibid.* The well-pleaded-complaint rule, the Court held, "applies only to statutory 'arising under' cases"; it "has no applicability" to cases "based on a separate and independent jurisdictional grant." *Ibid.* That includes diversity. See *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 644 n.12 (2006); *Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 (1983). The decisions on which Shorts relies—*Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), and *Vaden* v. *Discover Bank*, 129 S. Ct. 1262 (2009)—are federal-question cases.

It would be particularly inappropriate to apply the "well-pleaded complaint" rule in a diversity case, like this, in which federal jurisdiction was created by the *non*-removing party. One of the principal purposes of the rule is to prevent a defendant from removing on the basis of a claim asserted by the *defendant*, because that would defeat the plaintiff's choice of a state forum. See *Holmes Group*, 535 U.S. at 831-832; *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 398-399 (1987). In this case, the defendant (more specifically, the "additional" counterclaim defendant) has sought to remove on the basis of a claim asserted by the *plaintiff* (more specifically, the counterclaim plaintiff)—namely, Shorts' class-action allegations. ATTM's removal no more defeats Shorts' choice of a

state forum here than in any case in which the plaintiff's state-court action is one over which there is federal jurisdiction.

B. The Question Presented Is An Important One

The court below held that a qualifying class action can be removed to federal court under CAFA if it is filed as an independent suit but not if it is filed as a counterclaim to an existing suit. As the petition explains (at 21-24), that holding is highly consequential, because it undermines CAFA's basic purpose, which is to prevent plaintiffs' lawyers from manipulating pleadings to keep interstate class actions in state court. Shorts does not deny that the decision below permits—and indeed encourages—precisely what CAFA was enacted to prevent. Instead, she argues that certiorari should be denied because (1) there is not yet a circuit conflict and (2) ATTM overstates the likelihood that the issue will recur. Opp. 7-13. Shorts is mistaken on the second point; and the first is not a reason to deny review.

1. A commentary on the decision below correctly described the filing of class-action counterclaims in cases of this type as "an increasingly frequent scenario." Don Zupanec, *Palisades Collections LLC v. Shorts*, 24 FED. LITIGATOR 7 (Feb. 2009). Shorts nevertheless contends that there is a "dearth of actual cases on point." Opp. 13. According to her, "only *six* counterclaim class actions have been removed to the federal courts" since CAFA's enactment in 2005. *Ibid.*; see *id.* at 8-9 n.9 (citing cases).

That figure is too low. To begin with, it omits at least three identifiable cases in which a counterclaim class action was removed: this case; a case cited by

Shorts herself, *FIA Card Services, N.A.* v. *Gachiengu*, 2008 WL 336300 (S.D. Tex. Feb. 5, 2008); and a case decided less than two months ago, *Deutsche Bank National Trust Co.* v. *Weickert*, 2009 WL 1011098 (N.D. Ohio Apr. 15, 2009). Even as modified, moreover, the figure includes only cases in which there is an electronically available written decision. That is likely an inaccurate measure of the number of state-court cases in which a defendant has filed a counterclaim class action, because it does not capture those in which (a) the counterclaim defendant has decided not to remove (perhaps because of adverse precedent); (b) the counterclaim defendant has decided to remove but has not yet done so; (c) the counterclaim plaintiff has not yet filed a motion to remand; (d) the district court has not yet acted on the motion; (e) the court acted on the motion without issuing a written order; or (f) the order is not electronically available.

Even if it were true that there have been only nine post-CAFA cases in which a state-court defendant filed a counterclaim class action, the cases would still represent, in the words of Shorts' own consultant, "just the tip of an approaching iceberg." Pet. 23. Shorts points out that the same article argues that counterclaim defendants have no authority to remove. Opp. 12. But a law professor's defense of counterclaim class actions makes it *more* likely that plaintiffs' lawyers will employ the tactic, not less. The same is true of the Fourth Circuit's decision here. Indeed, one of the central points of the petition is that review is warranted because the decision provides a roadmap on how to circumvent the Act. Whatever the precise number of class-action counterclaims that have been filed since CAFA's enactment, therefore, there are sure to be many more now that

the Fourth Circuit has given the practice its imprimatur.

Shorts suggests that there are not likely to be many such cases, because "joinder rules limit the use of class action counterclaims." Opp. 13. But in the typical class action against a "joined" party that gives rise to the issue here—a case in which B attempts to collect a debt from A, who then counterclaims against B and joins C, the entity that sold the debt to B—there is no reason (and Shorts provides none) to think that A will be unable to join C as an "additional" counterclaim defendant under state law. In any event, the Fourth Circuit held that CAFA does not authorize removal by *any* counterclaim defendant, "additional" or otherwise (Pet. App. 14a n.4), and that is the question on which ATTM is seeking review (Pet i). The supposed difficulty of "joinder" would not prevent the issue from arising in cases—of which there are already several—where the defendant filed a counterclaim only against the plaintiff and did not join any "additional" counterclaim defendant.

Finally, there need not be scores, or even dozens, of cases in which the question presented arises before it can be considered sufficiently important to warrant this Court's intervention. By the very nature of the issue, there is a large amount of money at stake—at least $5 million (the jurisdictional threshold) in every case; tens of millions of dollars in this one (Pet. App. 53a)—and there is generally a higher probability of coercive settlement when a case remains in state court. For that reason, the identifiable cases that present the issue, the substantial likelihood that there are others, and the near certainty that there will be many more are—

collectively—sufficient to justify review. "Th[e] enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring)

2. Shorts also contends that certiorari should be denied because "there is no circuit split to resolve." Opp. 7. As the petition explains (at 9-10), however, that is not a reason to deny review when the decision below is seriously flawed, fundamentally undermines the core purpose of an important statute, and threatens nationwide harm; when both sides of the issue have been exhaustively explored in the majority and dissenting opinions; and when awaiting another case would require class-action defendants to continue expending large sums of money in defense and settlement of the very type of state-court litigation that CAFA was enacted to prevent. That is doubtless why Judge Niemeyer urged this Court to give the case "early consideration." Pet. App. 36a-37a.

There is another reason why the absence of a circuit conflict is not a basis for denying review. After the petition in this case was filed, a district court in the Northern District of Ohio held that "additional" counterclaim defendants "may properly remove th[e] case to this Court under CAFA." *Deutsche Bank Nat'l Trust Co.*, 2009 WL 1011098 at *3. (The Sixth Circuit will not decide the issue in that case, because the counterclaim plaintiffs did not seek permission to appeal.) Shorts is therefore mistaken in her contention that there is "no case * * * that purports to allow removal [by a counterclaim defendant] pursuant to CAFA." Opp. 7 n.7. While the conflicting district court decision obviously does not provide a basis for

certiorari *by itself*, see Sup. Ct. R. 10, it "reinforce[s] [the] other and more substantial bas[e]s for review," E. Gressman et al., SUPREME COURT PRACTICE § 4.8, at 256-257 (9th ed. 2007).

C. The Court Of Appeals' Decision Is Erroneous

As the petition explains (at 10-21), the decision below is inconsistent both with CAFA's unambiguous text and with its undisputed purpose. The Act provides that "any" defendant may remove—a term, as this Court has repeatedly held, that means "of whatever kind." Pet. 11. Because a counterclaim defendant is obviously a "kind" of defendant, the "plain language" of CAFA "clearly provides" that a counterclaim defendant has removal authority. Pet. App. 31a, 36a (Niemeyer, J., dissenting). But even if the statutory text does not unambiguously *authorize* removal by a counterclaim defendant, the text certainly does not unambiguously *prohibit* it. For that reason, the interpretation that is consistent with the Act's purpose should be preferred to the one that is not. Shorts offers no persuasive counter-arguments.

1. Shorts contends that CAFA incorporates the holding of *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941)—that a counterclaim defendant could not remove under the general removal statute then in effect—and that, as a removal statute, Section 1453(b) must in any event be strictly construed. Opp. 14-15 & n.16, 17-18. We explain in the petition (at 11-13) why those arguments are wrong. As to the first, because CAFA uses expansive language ("*any* defendant"), Congress could not have meant to incorporate an interpretation of restrictive language ("*the* defendant"). As to the second, the federalism-based canon of strict construction has no applicability to

CAFA, which explicitly "*liberalized* removal authority" and did so for the very purpose of "*further[ing]* the proper balance of federalism." Pet. App. 30a (Niemeyer, J., dissenting) (first emphasis added).

Shorts provides no response to either point. She does argue that, because Congress considered but rejected the possibility of allowing removal by "class-member plaintiffs," it "should not be presumed to have altered [the *Shamrock Oil* rule] silently." Opp. 18. But Congress did decide to allow removal by "any defendant," and thereby altered the *Shamrock Oil* rule *expressly*.

2. As for our argument that CAFA must be read in light of the congressional purpose, Shorts mischaracterizes it as one based upon "legislative history." Opp. 15. In so doing, she ignores CAFA's *text*, which provides, in a subsection titled "Purposes," that one of "[t]he purposes of this Act" is to "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2). The purpose explicitly set forth in the statute passed by both Houses of Congress and signed by the President is thus precisely the same as that reflected in the "legislative history": to ensure that qualifying class actions can be litigated in federal court.

In this connection, it is telling that Shorts does not even cite, much less attempt to distinguish, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71 (2006), a case the petition discusses at length (at 20-21). *Dabit* involved a statute very much like CAFA and relied heavily on its purpose in interpreting it broadly to prevent plaintiffs' lawyers from circumventing class-action limitations imposed by Congress.

Shorts argues that "there is no basis for inferring that Congress intended that all or even most class actions should end up in federal court," because CAFA "does not require that any class action be filed in or removed to federal court" and the Act "require[s] district courts to remand class actions" in certain circumstances. Opp. 17. But ATTM has never suggested that Congress wanted *all* class actions to be litigated in federal court; and neither of the features of CAFA that Shorts identifies remotely supports the conclusion that Congress meant to prohibit counterclaim defendants from removing *qualifying* class actions. The class actions that district courts are required to remand, by definition, are not qualifying ones—*i.e.*, they are not "interstate cases of national importance." CAFA § 2(b)(2). And the point of CAFA is not that class actions that *are* qualifying ones *must* be litigated in federal court, but that they *may* be at the defendant's option. The decision below is erroneous because it deprives a defendant of that option in any case in which counsel chooses to plead a qualifying class action as a counterclaim rather than a freestanding suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2009

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No. 08-1156

IN THE
Supreme Court of the United States

AT&T MOBILITY LLC AND
AT&T MOBILITY CORPORATION.,
Petitioners,

v.

CHARLENE SHORTS AND
PALISADES COLLECTIONS LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest federation of business companies and associations, with an underlying membership of more than three million business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in seeking review of the Fourth Circuit's decision in this matter, which created an enormous loophole in the Class Action Fairness Act ("CAFA"). The Chamber played a significant role in the design and enactment of CAFA. And the Chamber's members are frequently defendants in lage interstate class actions in which the existence of removal au-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

thority under CAFA is at issue. Accordingly, the central question presented by this petition – whether counterclaim defendants are statutorily barred from invoking CAFA's removal provisions – is of significant and widespread importance to the Chamber and its members. Given the profound effect that the decision below will have on the Chamber's members absent review, the Chamber files this *amicus* brief in support of the petition.

INTRODUCTION AND SUMMARY

Four years ago, our nation took a critical step toward ending class action abuse with the enactment of CAFA. The decade preceding CAFA's passage had seen an exponential increase in the number of class actions brought in the United States, as plaintiffs' attorneys exploited a loophole in federal diversity jurisdiction allowing them to bring interstate class actions involving tens or even hundreds of millions of dollars in certain state courts that came to be known as "magnet jurisdictions." Class Action Fairness Act of 2005, S. Rep. No. 109-14, at 13 (2005). These magnet jurisdictions engaged in numerous abusive practices, such as certifying class actions on an ex parte basis and approving class settlements that primarily benefited the plaintiffs' attorneys. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions. The results have been dramatic: "magnet jurisdictions" have seen a marked drop in class action activity and reports of class action abuse are waning. *See, e.g.*, Ted Frank, *The Class Action Fairness Act Two Years Later*, AEI Liability Outlook (Mar. 2007), *available at* http://www.aei.org/docLib/20070327_Liability.pdf.

The decision below – issued over a forceful dissent by Judge Niemeyer – threatens to erase these advances and put magnet jurisdictions back in business by barring counterclaim defendants from invoking CAFA's removal provisions. In this case, Palisades Collection LLC ("Palisades") brought a debt collection proceeding against Respondent Charlene Shorts arising out of an unpaid cellular telephone bill. Shorts then transformed that suit into a multimillion dollar putative statewide class action by filing a counterclaim class action against Palisades and Petitioners AT&T Mobility LLC and AT&T Mobility Corporation, alleging violations of the West Virginia Consumer Credit & Protection Act. Pet. App. 3a. The proposed class action created by the counterclaim – involving more than 160,000 potential class members and putting at least $16 million in controversy, *id.* 20a-21a – is precisely the type of large, interstate class action over which CAFA was intended to create federal jurisdiction; indeed, the district court specifically noted that the putative class action clearly satisfies each of CAFA's jurisdictional prerequisites, *id.* 54a-55a ("It appears, then, that this Court would have jurisdiction over this case, if it ha[d] been properly removed."). Nonetheless, the court of appeals held that removal was improper because the putative class action was brought as a counterclaim as opposed to a free-standing case. *Id.* 20a.

Judge Niemeyer dissented. He explained that the majority's holding was contrary to the purpose and text of CAFA, which allows "any" defendant to seek removal. *Id.* 23a (citing 28 U.S.C. § 1453(b)). He also dissented from the denial of rehearing, after

declining to request a poll because he "prefer[red] to release this case to the early consideration of the Supreme Court." *Id.* 36a-37a.

The Chamber fully agrees with each of the arguments raised in the Petition for Writ of Certiorari regarding the proper construction of CAFA and the suitability of this case as a vehicle for resolving this important issue. The Chamber writes separately, however, to emphasize three further arguments that support certiorari. First, the decision below, if left undisturbed, will have an immediate, substantial impact on class action litigation in the United States, largely undoing the changes instituted by CAFA. As the procedural history set forth in the Petition makes clear, this is essentially a test case regarding the viability of evading CAFA's requirements through counterclaim class actions and thereby "reviving" the abusive state court class action practice that existed pre-CAFA. *See* Pet. 5-9. In fact, one of the plaintiffs' litigation consultants has authored a law review article extolling the use of the counterclaim class action as a means for circumventing CAFA, and analogous counterclaim class actions are currently pending across the country. *See id.* 23 n.10 (citing cases). Moreover, the "counterclaim class action" is a relatively easy tactic for other plaintiffs' attorneys to copy. As a practical matter, plaintiffs' attorneys will have little trouble finding debt collection proceedings or other small-scale litigation to serve as a vehicle for such counterclaim class actions; indeed, if need be, plaintiffs' attorneys could engineer the requisite initial proceeding by, for example, having a potential counterclaim plaintiff fail to pay certain bills. In short, if this Court de-

clines to review and reverse the court of appeals' decision, the result will be widespread circumvention of CAFA, substantially compromising the statute's effectiveness.

Second, the court of appeals' decision is inconsistent with holdings of other circuits recognizing that under CAFA, each defendant stands alone, with independent removal rights based on its individual circumstances. Since CAFA's enactment, numerous courts have concluded – primarily in the context of proceedings involving the applicability of CAFA to class actions commenced prior to CAFA's effective date – that the actions and conduct of one defendant in a multi-defendant class action have no bearing on the ability of another defendant to remove under CAFA. These holdings follow from the statutory text, which allows "any" defendant to remove. 28 U.S.C. § 1453(b). The decision of the court below, however, effectively precludes Petitioners from removing on the basis of an independent action taken by Palisades Collection LLC, specifically Palisades' initiation of the original debt collection proceeding. Petitioners' only involvement in this proceeding is as defendants in a multi-million dollar, interstate class action – in that regard, they are identically situated to the various defendants across the country who remove class actions under CAFA every day. And yet, because Palisades' original suit allowed the Plaintiff-Respondent to bring her class action as a counterclaim, the court of appeals denied Petitioners the right to remove under CAFA. This decision cannot be reconciled with prior CAFA jurisprudence, and – if left undisturbed – would create substantial

confusion in lower courts on how to apply CAFA in multi-defendant proceedings.

Finally, granting the Petition for Writ of Certiorari would permit this Court to resolve a longstanding circuit split on the important jurisdictional issue of a third-party defendant's removal rights. The court of appeals predicated its decision in part on the understanding that this Court's decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), precludes all counterclaim defendants from exercising removal rights. But the Court in *Shamrock Oil* only addressed whether a counterclaim defendant who was the original plaintiff in the case possessed removal rights. The Court found that he did not because he had initiated litigation in state court and therefore, "having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal." *Id.* at 106. *Shamrock Oil* did not decide whether counterclaim defendants who were not the original plaintiffs in the suit – *i.e.*, defendants like Petitioners here – enjoy the right of removal, and the lower courts have split on whether the *Shamrock Oil* rule extends to such additional counterclaim defendants. As a general matter, the Chamber, like Petitioners, contends that Congress created a new rule regarding removal rights in enacting CAFA, and that *Shamrock Oil* is not applicable to removals under CAFA. But to the extent the Court concludes otherwise, this case provides a vehicle for clarifying the scope of *Shamrock Oil*'s reach.

For these reasons, as well as those raised by Petitioners, the Court should grant the Petition.

ARGUMENT

I. THE DECISION BELOW INVITES THE VERY TYPES OF ABUSE THAT CONGRESS ENACTED CAFA TO PREVENT.

The Court should grant the Petition for Writ of Certiorari first and foremost because the decision below carves an enormous loophole in CAFA that would severely compromise the statute's effectiveness. CAFA was enacted primarily to extend federal diversity jurisdiction to large, interstate class actions involving substantial amounts in controversy. Although the Framers created diversity jurisdiction to ensure that proceedings involving parties from different states and sufficiently large quantities of money were adjudicated in federal court, the federal diversity statute prior to CAFA provided federal jurisdiction only for those class actions in which every putative class member's claim exceeded the individual amount-in-controversy requirement of $75,000. *See* S. Rep. 109-14, at 8, 10-11. CAFA was intended to restore the intent of the Framers and end various stratagems that certain lawyers had undertaken to keep class actions out of federal court. *See id.* at 24 ("[A] system that allows state court judges to dictate national policy . . . from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism."); *id.* at 10 ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court.").

In the roughly four years since CAFA was passed, it has largely succeeded in achieving these goals,

with recent studies noting that significantly more class actions have been removed to federal court than in the years prior to CAFA's enactment. *See, e.g.*, Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, Federal Judicial Center (Apr. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf. But the decision of the court below threatens to restore (to a significant extent) the pre-CAFA status quo. If allowed to stand, the court of appeals' ruling that counterclaim defendants have no removal rights would provide plaintiffs' attorneys with a simple tool for evading CAFA – bringing class actions as counterclaims.

Indeed, confirming the viability of this stratagem is likely one of the primary goals of Plaintiff-Respondent's counsel in this litigation; as Petitioners note, one of Plaintiff-Respondent's litigation consultants authored a law review article advocating the use of counterclaims to evade CAFA's restrictions. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007).

The Tidmarsh article provides a playbook for plaintiffs' counsel seeking to evade CAFA in this manner. According to the article, in the "typical scenario," a consumer "fails to make a required payment under the contract to the other party – usually a financial institution that sells credit, mortgage, or insurance products." *Id.* at 196-97. After the service provider sues in state court to recover the relatively

small sum due under the contract, the consumer promptly asserts a counterclaim class action, alleging that the contractual term on which the debt collection action is based violates state law. *Id.* at 197. "If consumers can successfully avoid federal court with this tactic . . . the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake," and "[t]he entire litigation dynamic and its center of gravity switches in an instant." *Id.* at 199. The article observes that "[f]aced with this reality, financial institutions will need to think carefully before they file collection actions in state courts in which they do not wish to defend their credit and lending policies." *Id.*

The article further highlights that the "tactic" employed in this case is no anomaly, but rather is certain to become a recurring problem. Pointing to a number of recent counterclaim class actions brought in state court, including this case, the article boasts that such cases "reveal just the tip of an approaching iceberg." *Id.*; *see also* Pet. 23 n.10 (citing cases); Don Zupanec, 24 No. 2 *Federal Litigator* 7 (Feb. 2009) (describing use of this tactic as "an increasingly frequent scenario"). The Tidmarsh article leaves no doubt: this is a test case for circumventing CAFA, and unless the Court grants review, plaintiffs' lawyers quickly will replicate it across the country.

In sum, the purpose of CAFA was to change the nature of class action practice in the United States by closing loopholes in the federal diversity jurisdiction statute and ensuring that class action settlements were not approved unless they served the interest of the actual parties to the litigation. CAFA

has by and large succeeded in that endeavor, thereby reducing the burdens of class action abuse on American consumers, businesses, and courts. But if the court of appeals' decision to deny CAFA removal rights to all counterclaim defendants is allowed to stand, it will undermine the statute's central purpose and reverse the improvements of the past four years. Plaintiffs' attorneys would have an easy way to avoid federal jurisdiction for class actions, and, as the Tidmarsh article makes clear, they would hasten to take advantage of it. The Court should grant review to avoid that result.

II. THE DECISION BELOW IS IN TENSION WITH DECISIONS OF OTHER CIRCUITS HOLDING THAT ONE DEFENDANT CANNOT ELIMINATE ANOTHER'S REMOVAL RIGHTS UNDER CAFA.

The Court should also grant the Petition because the decision below is likely to breed significant confusion over the application of CAFA in multi-defendant proceedings. One of the principal changes that CAFA made to removal practice was to disaggregate the removal rights of different defendants. Under traditional removal principles, a multi-defendant action could only be removed to federal court if all defendants consented to removal; thus, each defendant's removal rights fundamentally were linked to the rights of the other defendants. CAFA eliminated this linkage, allowing "any" one defendant in a multi-defendant action to act independently of any others in removing a case to federal court. 28 U.S.C. § 1453(b). The decision of the court below, however, runs contrary to this principle, preventing Petitioners from exercising their right of re-

moval because of the actions of their co-defendant – *i.e.*, Palisades' decision to bring a debt collection action against Ms. Shorts. This interpretation of CAFA is in tension with several other rulings that have been issued under the statute.

Thus far, the overwhelming majority of courts applying CAFA have analyzed the circumstances of each class action defendant independently in determining whether such defendant may remove pursuant to CAFA. This issue has arisen most frequently in the context of whether a new defendant named after CAFA's date of commencement has independent authority to remove a case.[2] Courts have been virtually unanimous in holding that CAFA allows the newly added party to independently seek removal, regardless of the removal rights of other defendants. *See, e.g.*, *Braud v. Transp. Serv. Co.*, 445 F.3d 801, 808 (5th Cir. 2006) ("The language of CAFA is plain that any single defendant can remove (without the consent of other defendants) the entire class action . . . ."); *Schorsch v. Hewlett Packard Co.*, 417 F.3d 748, 749 (7th Cir. 2005); *Prime Care of Ne. Kan. LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir. 2006); *Robinson v. Holiday Universal, Inc.*, Civ. A. No. 05-5726, 2006 U.S. Dist. LEXIS 7252 (E.D. Pa. Feb. 23, 2006); *Adams v. Fed. Materials Co.*, Civ. A. No. 05-90, 2005 U.S. Dist. LEXIS 15324, at *13 (W.D. Ky. July 28, 2005).[3] Thus, for example,

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[2] Because CAFA does not apply retroactively, defendants in a suit pending at the time the statute went into effect cannot seek removal pursuant to its provisions.

[3] Only the Ninth Circuit has held to the contrary, and it has done so based on California state law regarding when an

a class action commenced long before CAFA's enactment with respect to three defendants might be removed to federal court by a fourth defendant added after CAFA's effective date – the fact that the first three defendants are barred from removing under CAFA would have no bearing on the fourth defendant's removal rights.

The Fourth Circuit's opinion here is in tension with the application of CAFA in these cases. Petitioners in this case were strangers to this litigation until Plaintiff-Respondent filed her counterclaim and class allegations. They have participated in this litigation only as out-of-state defendants facing multi-million dollar class actions; accordingly, their circumstances are functionally identical to those of numerous class defendants who remove on the basis of CAFA every day. Under an approach that analyzed Petitioners' right of removal independently, they clearly would be able to invoke CAFA jurisdiction. Yet, according to the decision below, Petitioners are precluded from invoking CAFA because their fellow defendant, Palisades, previously had instituted a state court action against Plaintiff-Respondent.

In short, the decision below suggests that there are circumstances in which one defendant's conduct can affect another defendant's removal rights under CAFA. Such an approach is at odds both with the text of § 1453(b), which indicates that a defendant's right to remove under CAFA turns solely on that specific defendant's capacity to satisfy the removal

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action commences. *McAtee v. Capital One, F.S.B.*, 479 F.3d 1143, 1148 (9th Cir. 2007).

requirements, and with the decisions of courts of appeals analyzing removal rights under CAFA on a defendant-by-defendant basis. The Court should grant the petition to resolve this conflict and affirm that each defendant's removal rights under CAFA are unaffected by the presence or conduct of any other defendant.

III. GRANTING THE PETITION WOULD ALLOW THIS COURT TO RESOLVE LONG-STANDING UNCERTAINTY OVER THE REACH OF *SHAMROCK OIL*.

Finally, review is warranted because this case potentially provides the Court with the opportunity to clarify the scope of *Shamrock Oil*, 313 U.S. 100, which defined the removal rights of counterclaim defendants under the traditional removal statute, 28 U.S.C. § 1441. *Shamrock Oil* holds that the "plaintiff" in an action in which a counterclaim is filed may not seek removal of the case to federal court. *Id.* at 103. As a general matter, the Chamber agrees with Petitioners that *Shamrock Oil* is inapplicable to the CAFA removal provision, 28 U.S.C. § 1453. This is so because, as Judge Niemeyer explained in his dissent, the statute at issue in *Shamrock Oil* allowed "*the* defendant" to remove, 28 U.S.C. § 1441(a), in contrast to CAFA, which allows "*any* defendant" to remove, 28 U.S.C. § 1453(b). Pet. App. 23a.

But even if the Court disagrees and believes that *Shamrock Oil* is implicated in CAFA's construction, review is still warranted because the lower courts are split on whether the *Shamrock Oil* rule applies to counterclaim defendants, such as Petitioners, who were not plaintiffs in the original action. Although

the court below held that *Shamrock Oil* does extend to such additional counterclaim defendants, *id.* 10a-11a, several other courts have reached the opposite conclusion. *See, e.g.*, *State of Tex. v. Walker*, 142 F.3d 813, 816 (5th Cir. 1998); *Mace Sec. Int'l, Inc. v. Odierna*, No. 08-60778-CIV, 2008 WL 3851839, at *4 (S.D. Fla. Aug. 14, 2008); *H&R Block, Ltd. v. Housden*, 24 F. Supp. 2d 703, 706 (E.D. Tex. 1998). Accordingly, granting the Petition would permit the Court to clarify the conflict in the lower courts on this issue.

In *Shamrock Oil*, this Court held that a counterclaim defendant who was the original plaintiff could not remove an action to federal court because "the *plaintiff*, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal." 313 U.S. at 106 (emphasis added). The Court quoted Congress's view that it was "just and proper to require the plaintiff to abide his selection of a forum," *id.* at 106 n.2 (quoting H.R. Rep. No. 49-1078, at 1 (1st Sess. 1887)), and noted that, if the plaintiff "elects to sue in a State court when he might have brought his suit in a Federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause," *id.*; *see also* Pet. App. 25-26 n.11. In other words, the Court in *Shamrock Oil* based its decision in significant part on the fact that the party seeking to remove had initiated the underlying action and had chosen the state court forum. According such a party the ability to remove therefore arguably would be at odds with the fundamental premise of the removal statute and diversity jurisdiction – to protect an out-of-state defendant hauled into state court by in-state plaintiffs

from the potential of unfair bias. *See* S. Rep. 109-14, at 8.

But *Shamrock Oil* did not decide whether a similar rule should apply to additional counterclaim defendants, like Petitioners, who have never "submitted [themselves] to the jurisdiction of the state court" and have never made any "selection of a forum" by which they should be required to abide. As noted above, such counterclaim defendants are essentially indistinguishable from traditional defendants in terms of their involvement in litigation. The effect of extending *Shamrock Oil* to additional counterclaim defendants therefore is to bind such parties to a forum they have not selected and a jurisdiction to which they have not submitted themselves. In light of the reasoning of *Shamrock Oil* and fundamental removal principles, such an extension seems plainly unwarranted. *See* Michael C. Massengale, Note, *Rigorous Uncertainty: A Quarrel with the "Commentators' Rule" Against Section 1441(c) Removal for Counterclaim, Cross-Claim, and Third-Party Defendants*, 75 Tex. L. Rev. 659, 676 (1997) (explaining that "[i]t is a far stretch to move from" *Shamrock Oil*'s narrow holding to the contention that an additional defendant cannot remove).

In sum, the Chamber believes that *Shamrock Oil* does not extend to CAFA removals. But even if it did, review would be all the more appropriate, because the Circuits are at odds on the applicability of *Shamrock Oil* where, as here, the counterclaim defendant was a stranger to the case before the counterclaim was filed. For this reason too, the Petition should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Petitioners, the Court should grant the Petition for a Writ of Certiorari.

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